2006

Emily Normandeau v. Hanson Equipment, INC : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

EMILY NORMANDEAU, individually and as guardian for ALEX THAYN, JACOB THAYN and HANNAH NORMANDEAU, minors, and LORI NORMANDEAU, as guardian for DANIEL NORMANDEAU and MELISSA NORMANDEAU, minors, on behalf of and for the benefit of the heirs of DENNIS NORMANDEAU, deceased, Plaintiffs/Appellees, v. HANSON EQUIPMENT, INC., a corporation, Defendant/Appellant.	**BRIEF OF APPELLEES** Case No. 20060723-CA

On Remand from the Utah Supreme Court

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PARTIES TO THE PROCEEDINGS BELOW

The caption contains the names of all parties in the appellate courts. In addition to the parties listed in the caption, the following were also defendants in the trial court: International Truck and Engine Corporation; Bendix Commercial Vehicle Systems, LLC; General Motors Corporation, by and through its Allison Transmission Division; Budget Rent a Car System, Inc., fka Budget/Ryder TRS; Summit House Fine Furniture, L.L.C.; and Dana Corporation. All of the defendants except Hanson Equipment, Inc., were dismissed before trial and are not parties to the appeal.

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JURISDICTION

This court has jurisdiction under section 78A-4-103(2)(j) of the Utah Code.

ISSUES

1. Hanson Equipment's negligent repair of a rental truck caused the truck to break down on a trip from Utah to Washington and also caused unforeseen torque to build up in the truck's drive line. Dennis Normandeau, a tow-truck driver called to the scene, was killed when the built-up torque was violently released as he was preparing the truck for towing. Did Hanson owe Mr. Normandeau a duty of care?

Standard of Review: Plaintiffs agree with Hanson's statement of the standard of review: On appeal from a summary judgment motion, the appellate court views the facts and all reasonable inferences that can be drawn from them in the light most favorable to the nonmoving party (here, the plaintiffs) and reviews the trial court's legal conclusions for correctness.[1]

Preservation: Hanson preserved this issue in its motion for summary judgment and supporting memorandum. (*See* Record ("R.") at 612-631.)[2]

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[1] *E.g., Tallman v. City of Hurricane,* 1999 UT 55, ¶ 1, 985 P.2d 892.

[2] *See also Normandeau v. Hanson Equip., Inc.,* 2009 UT 44, ¶ 24, 215 P.3d 152 ("We . . . hold that by moving for summary judgment on the issue of duty,

2. Hanson never raised the professional rescuer doctrine as an affirmative defense, and, in moving for summary judgment, it never mentioned the doctrine. Hanson also failed to raise the doctrine in its briefs in this court and in the Utah Supreme Court. Has Hanson waived its argument that a form of the professional rescuer doctrine should apply?

Standard of Review: This court does not review issues or arguments not preserved below, and, by failing to brief the professional rescuer doctrine on appeal, both in this court and in the Utah Supreme Court, Hanson did not preserve the issue.[3]

Preservation: The professional rescuer doctrine was not preserved for appeal.

Hanson properly preserved that issue for appeal."). A copy of the supreme court's opinion is included in the addendum.

[3] *E.g., United States v. Sears*, 411 F.3d 1240, 1240-41 (11th Cir. 2005) (the appellant's failure to raise an issue in his initial brief precludes him from doing so on remand); *Princeton Biochems., Inc. v. Beckman Instruments, Inc.*, 215 F.3d 1349 (table), No. 98-1525, 1999 WL 641233, slip op. at *2 n.2 (Fed. Cir. 1999) (copy included in addendum) (a party may not raise on remand an issue not previously appealed) (citing *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83 (Fed. Cir. 1999)); *United States v. Glover*, 149 F. Supp. 2d 371, 378 (N.D. Ill. 2001) (ordinarily, failing to raise a ground on appeal precludes raising it on remand) (citations omitted).

3. The professional rescuer doctrine as adopted in Utah is limited to professional rescuers who are public employees. Mr. Normandeau was not a public employee; Hanson was not the party needing rescuing; and Hanson's negligence not only created the need for a tow truck but also created the very hazard that killed Mr. Normandeau. Did the trial court err in holding that the professional rescuer doctrine does not apply under the facts of this case?

Standard of Review: If the issue had been preserved for appeal, it would have been by Hanson's unauthorized Supplemental Briefing in Support of Defendant's Motion for a New Trial (R. 1847-66.) A trial court's denial of a motion for new trial is generally reviewed for an abuse of discretion.[4] "However, if the trial court has made a determination of law that provides a premise for its denial of a new trial, such a legal decision is reviewed under a correctness standard."[5]

Preservation: This issue was not preserved for appeal.[6]

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[4] *E.g., Child v. Gonda,* 972 P.2d 425, 428 (Utah 1998).

[5] *Crookston v. Fire Ins. Exch.,* 860 P.2d 937, 938 (Utah 1993).

[6] *See* issue no. 2, *supra,* & pt. II, *infra.*

DETERMINATIVE RULE

Utah Rule of Appellate Procedure 24(a)(9) is determinative of the second issue on appeal. It is set out in the addendum.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Prior Dispositions.

This is a wrongful death action. Hanson Equipment negligently repaired a Ryder truck, which caused it to break down on Soldier Summit in Utah County. The negligent repair also caused torque to build up in the drive line. The plaintiffs' husband and father, Dennis Normandeau, was killed when that torque was released as he was disconnecting the drive line so that he could tow the truck.

The plaintiffs sued Hanson and other companies associated with the design, manufacture, and lease of the truck. (R. at 1-13.) All the defendants except Hanson were dismissed before trial. (R. at 413-14, 550, 577-78, 586-87, 601-02, 1398-99.) Hanson moved for summary judgment on the grounds that it owed Mr. Normandeau no duty, that its negligence was not the proximate cause of Mr. Normandeau's death, and that his contributory negligence was the sole proximate cause. (R. at 612-13.) The trial court denied that motion (R. at 1182-84), and the case went to trial (*see* R. at 1689).

The jury returned a unanimous verdict in favor of the plaintiffs and 100 percent against Hanson. (R. at 1682-84.)

The trial court denied Hanson's motion for a new trial or, in the alternative, for a remittitur. (R. at 2007-26.) Hanson then appealed (R. at 2028-29), and the appeal was poured over to this court (R. 2066-70).

This court issued an opinion affirming the jury verdict.[7] A majority of the panel did not reach the issue of whether the trial court correctly denied Hanson's motion for summary judgment, on the grounds that the issue was "not appealable under prior Utah case law and the facts of this case."[8] One judge dissented in part. He concluded that the court had jurisdiction to reach the merits of Hanson's motion for summary judgment[9] but would have ruled that the trial court correctly denied that motion, since "Hanson's moving papers failed to establish, as a matter of law, that Hanson owed no duty of care to Normandeau."[10]

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[7] *Normandeau v. Hanson Equip., Inc.*, 2007 UT App 382, 174 P.3d 1 (a copy of which is included in the addendum), *rev'd*, 2009 UT 44, 215 P.3d 152.

[8] 2007 UT App 382, ¶ 14.

[9] *Id.* ¶¶ 34-36 (Orme, J., concurring in part and dissenting in part).

[10] *Id.* ¶ 37.

Hanson petitioned the Utah Supreme Court for a writ of certiorari, which the court granted to consider whether this court erred in its construction and application of the rules governing appellate review of denials of summary judgment.[11]

After further briefing in the Utah Supreme Court, that court issued its decision, holding that, to the extent Hanson argued in its motion for summary judgment that it owed no duty of care to Mr. Normandeau, the motion raised a purely legal issue that was properly preserved for appeal.[12] The court remanded the case to this court to decide "whether the district court properly ruled that Hanson owed Mr. Normandeau a duty of care."[13]

B. Statement of Facts

This statement of facts is based primarily on the facts set out in the plaintiffs' memorandum in opposition to Hanson's motion for summary judgment (R. 821-986), which were the facts that were before the trial court when

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11 *See* Order, Mar. 7, 2008; 187 P.3d 232 (Utah 2008).

12 *See* 2009 UT 44, ¶¶ 17 & 24.

13 *Id.* ¶ 25.

it denied Hanson's motion.[14] Both the trial court and appellate courts are required to view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the non-moving party (here, the plaintiffs).[15]

Dennis Normandeau was killed when he responded to a call for roadside assistance after a Ryder rental truck broke down on Soldier Summit in Spanish Fork Canyon. Kristen Marion had rented the truck to move her family from Colorado to Washington. Hanson Equipment, Inc., a certified technician for International trucks like the Ryder truck, had repaired the truck just before Ms. Marion picked it up. The truck had been losing hydraulic fluid. The hydraulic fluid not only provided the truck with power steering but also kept the parking (or emergency) brake on the drive line released. The truck had a spring-applied

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[14] Similarly, Hanson takes its statement of facts primarily from its memorandum in support of its motion for summary judgment. (*Compare* Appellant's Br. at 2-4 *with* R. 619-25.) The plaintiffs disputed some of the facts in Hanson's statement of facts. (*Compare* R. 620-21, ¶¶ 5-7, *with* R. 831-33.) The factual disputes are irrelevant to the issues on appeal, however, because they went to Mr. Normandeau's alleged comparative fault in failing to check for and relieve torque from the drive line before trying to tow the truck, an issue that the jury decided against Hanson at trial. (*See* R. 1683, ¶ 5.)

[15] *E.g., Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co.*, 844 P.2d 322, 324 n.1 (Utah 1992); *Bowen v. Riverton City*, 656 P.2d 434, 436 (Utah 1982).

hydraulically released parking brake system. The parking brake was on the drive line behind the transmission and ran off the power steering unit. Hanson replaced part of the hose that carried the hydraulic fluid to the drive-line parking brake. Unfortunately, Hanson did not replace the hose with an approved replacement part or an equivalent hose. Instead, it replaced the hose with a fuel hose that could not withstand as much pressure. It also spliced the new hose to part of the old hose by clamping it to a threaded pipe nipple, which cut through the new, inferior hose, causing it to leak. (*See* R. 840, ¶ 1; 842-45, ¶¶ 7-15, 18-23; R. 2078, at 48:23-49:2.)

Hanson's negligent repair caused the newly spliced fuel hose to leak within hours after the truck was on the road. The loss of hydraulic fluid caused the parking brake to clamp down on the drive line and remain clamped, which quickly stopped the drive line from turning. The combination of the clamped drive-line brake and the weight and forward inertia of the truck as it came to rest caused extreme torque to build up in the drive line. (*See* R. 841-42, ¶¶ 3-7; 845, ¶¶ 22-24.)

The loss of hydraulic fluid from the repaired line also caused the loss of all the hydraulically-assisted power steering for the driver.

As Ms. Marion drove the truck up Soldier Summit, she could feel the truck slow down and the power steering go out. She had to pull off the road, stop, and call for roadside assistance. (R. 844, ¶ 17.) The vehicle could not be driven farther and had to be towed. Dennis Normandeau was eventually sent to tow the truck. (R. 622-23, ¶¶ 13-17.)

Before he could tow the truck, Mr. Normandeau had to disconnect the drive line from the transmission. Because of the leak in the hose that Hanson had spliced on, a huge amount of torque had built up in the drive line as the truck came to a stop. As Mr. Normandeau was disconnecting the drive line, this built-up energy was released violently, causing a part of the yoke on the differential at the rear of the drive line to break off. Either the yoke or the drive line hit Mr. Normandeau in the head, killing him instantly. (R. 845-46, ¶¶ 24-28; 848, ¶ 34.)

Mr. Normandeau's heirs sued Hanson, among others, claiming that its negligence was a cause of Mr. Normandeau's death. (R. 1-13.) Hanson moved for summary judgment on the grounds that it owed Mr. Normandeau no duty because he was "an unfor[e]seeable plaintiff," that its negligent repair could not be a proximate cause of his death, and that his own negligence was a superseding cause of his death. (R. 612-13.) The plaintiffs opposed the motion on the grounds

that, among other things, Hanson owed Mr. Normandeau a duty of care. (R. 852.)

The plaintiffs pointed out that one who negligently repairs a chattel can be liable to those who it should expect to use the chattel or be endangered by its probable use. (*See* R. 854-57.) The parties agreed that the foreseeability of harm is a major factor in determining whether one person owes another a duty of care (*see* R. 628-29, 857), and Hanson did not dispute that the foreseeability of harm to Mr. Normandeau was "'a triable issue of fact.'" (R. 858 (footnote omitted).)

At the hearing on the motion for summary judgment, Hanson agreed that the question of duty in this case hinged on the foreseeability of harm to Mr. Normandeau. (R. 2078 at 29:5-7 ("What we're saying is . . . it was just not foreseeable that this particular accident would have arisen . . ."); 33:25-34:2 ("There really aren't any other factors to consider in this case as to whether a duty was owed, except for the foreseeability.").[16] Hanson also agreed that it was foreseeable that if it did a negligent repair, the hose could fail, the vehicle would "end up going into self-preservation and pulling over to the side of the road," the

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[16] Hanson also acknowledged that foreseeability applied not only to the issue of duty but also to causation. (R. 2078 at 40:25-41:2.) As applied to causation, the jury found against Hanson on the issue of foreseeability. (*See* R. 1682, ¶ 2.)

occupants of the vehicle could be injured, other people on the road could be injured, and the vehicle would have to be towed. (R. 2078 at 34:3-18; 35:1-14; 41:14-42:1, 16-19.) Hanson also agreed that it was foreseeable that, to tow the vehicle, the drive line would have to be disconnected, and it did not dispute that there could be built-up torque in the drive line. (R. 2078 at 35:15-19; 36:4-37:10.) The only thing that Hanson claimed was unforeseeable was that a tow truck driver like Mr. Normandeau would not prepare the truck properly for towing. (R. 2078 at 34:18-25; 37:11-14; 42:19-22; 51:21-24.)

The trial court understood the facts of the case as follows:

> [I]t seems to me that . . . when that hose fails, we end up with a lock on the drive shaft; and that can potentially be a very dangerous situation, and it's caused--that is caused by the failure of the hose. The guy [Mr. Normandeau] goes in. He . . . may be negligent, maybe he isn't, I don't [know], but anyway, he's killed by that dangerous condition that exists because of the failure of the hose.

(R. 2078 at 38:18-25.) In denying Hanson's motion for summary judgment, the court said:

> I just feel that based on my understanding of the mechanics here--and . . . I'm not saying that I'm infallible on that, but based on my understanding of mechanics, it just seems to me that the failure of the hose exposes the tow truck driver who's got to disconnect, if he's going to tow, the drive shaft, to a hazardous situation. That hazardous situation, it seems, is . . . directly caused by the failure of the hydraulics. So I'm going to deny . . . the motion for summary judgment on that.

(R. 2078 at 53:25-54:9.)

The case went to trial, and the jury returned a unanimous verdict finding that Hanson's negligence was the sole proximate cause of Mr. Normandeau's death. (R. 1682-83.)

Hanson filed a post-judgment motion for a new trial (R. 1692-94), which the plaintiffs opposed (R. 1805-43). Hanson then filed, without leave of court, a "Supplemental Briefing in Support of Defendant's Motion for a New Trial" (R. 1847-66), raising, for the first time, the issue of whether the plaintiffs' claim was barred by the so-called professional-rescuer doctrine.[17] The trial court denied Hanson's motion for a new trial. (*See* R. 1949; 2007-26.)

Hanson appealed. (R. 2028-29.) In its docketing statement in this court, Hanson stated as one of the issues for appeal, "Does the professional rescuer doctrine . . . bar plaintiff's claims against Hanson?"[18] But Hanson never mentioned the doctrine again, through three rounds of briefing (its briefs in this court, its petition for a writ of certiorari, and its briefs in the Utah Supreme

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[17] Hanson later sought leave of court to file its supplemental brief. (R. 1941-42.) The trial court did not expressly grant that motion, but it considered Hanson's supplemental briefing and the plaintiffs' responsive memorandum in denying Hanson's motion for a new trial. (*See* R. 2009, ¶ 8.)

[18] Docketing Statement, dated Aug. 25, 2006, at 3, ¶ (c)(7)(iii).

Court), until its most recent brief, filed on remand to this court on October 26, 2009.

Instead, Hanson raised many other arguments on appeal. The only one that is still at issue is whether the trial court erred in granting Hanson's motion for summary judgment on the issue of duty. All of Hanson's other arguments have been decided against Hanson.[19]

SUMMARY OF ARGUMENTS

The trial court did not err in denying Hanson's motion for summary judgment on the issue of duty. As Judge Orme concluded the first time around, "Hanson's moving papers failed to establish, as a matter of law, that Hanson owed no duty of care to Normandeau . . . ."[20] Hanson's negligent repair not only caused the Ryder truck to break down, so it had to be towed, but also caused an excessive amount of torque to build up in the drive line. It was undisputed that, before he could tow the truck, Mr. Normandeau had to disconnect the drive line. When he did, the excessive torque that had built up in the drive line as a direct

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19 *See Normandeau,* 2007 UT App 382, ¶¶ 7-10, 15-32.

20 *See id.* ¶ 37 (Orme, J., concurring in part and dissenting in part).

and proximate result of Hanson's negligent repair was released violently, killing Mr. Normandeau.

The law is well established that one who negligently repairs a chattel can be liable to those who it should expect to use the chattel or be endangered by its probable use. Mr. Normandeau was a foreseeable plaintiff, to whom Hanson owed a duty of care. There is no public policy reason to shift the loss caused by Mr. Normandeau's death from Hanson, the culpable party, to Mr. Normandeau's widow and children. Therefore, under the facts of this case, the trial court did not err in denying Hanson's motion for summary judgment. (Pt. I.)

Hanson suggests that the professional rescuer doctrine should bar the plaintiffs' claim. The court should not reach Hanson's professional rescuer argument because the argument was not before the trial court when it denied Hanson's motion for summary judgment, was not properly preserved for appeal (pt. II), and does not apply in this case in any event (pt. III).

ARGUMENT

I.

THE TRIAL COURT PROPERLY DENIED HANSON'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF DUTY.

A. Hanson Owed Mr. Normandeau a Duty of Care on the Facts of This Case.

Hanson tries to reduce this case to a single, abstract proposition, namely, that a repair shop does not owe a duty of care to a tow truck driver.[21] Hanson argues that it does not have such a duty because the relationship between a repair shop and a tow truck driver is too attenuated, and any harm to a tow truck driver resulting from a negligent repair is unforeseeable. By framing the issue this way, Hanson tries to avoid one of the central facts of this case, namely, that Hanson's negligent repair of the Ryder truck's hydraulic line did not just cause the truck to break down, requiring the services of a tow truck driver, but also created the very hazard that killed Mr. Normandeau. For that reason, Hanson's assertion that "[t]he mere furnishing of the necessity of needing a repair person is

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[21] *See, e.g.,* Appellant's Br. at 1, 2, 5, 16.

not sufficient to impose a duty"[22] is irrelevant, since Hanson's negligence did much more than that.

The issue before the trial court was not the abstract issue of whether a repair shop owes a duty to a tow truck driver but whether Hanson owed a duty of care to Mr. Normandeau under the facts of this case.

Hanson claims that the plaintiffs' only claim against it was that it negligently repaired the truck, causing the truck "to break down under circumstances that required it to be towed."[23] In fact, the plaintiffs claimed that that was just one of the ways in which Hanson and the other defendants were negligent. (R. 190-91, ¶ 59 (the defendants' negligence "*included, but is not limited to,*" certain enumerated acts) (emphasis added).) The evidence developed

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[22] *Id.* at 8 (citing *Bryant v. Glastetter,* 38 Cal. Rptr. 2d 291 (Ct. App.), *review denied* (Cal. 1995), and *Sanders v. Posi-Seal Int'l,* 668 So.2d 742 (La. Ct. App.), *writ denied,* 672 So.2d 924 (La. 1996)). In *Bryant,* the defendant's negligence in driving while intoxicated only put the plaintiff's decedent (a tow truck driver) in a position where he was injured by the independent negligence of another driver. Other than making it more probable that the decedent would be in the place where the accident occurred, the defendant's negligence had nothing to do with the accident. *See* 38 Cal. Rptr. 2d at 295, 296. *Sanders* is also distinguishable. That case involved the question of whether one repairperson owes a duty to a subsequent repairperson hired to make the repaired part "like new." *See* 668 So.2d at 747. Mr. Normandeau was not hired to repair Hanson's shoddy work but was only hired to tow the truck to a place where the part could be repaired.

[23] Appellant's Br. at 4; *see also* R. 190-91, at ¶ 59(c).

through discovery showed that Hanson's negligent repair of the truck not only caused the truck to break down on the side of the road, requiring that it be towed, but also caused the parking brake to clamp down on the drive line while the drive line was turning. Hanson's negligence not only brought the truck to a stop but also caused a huge amount of unseen torque to build up in the drive line, which was violently released when Mr. Normandeau tried to prepare the truck for towing. (*See, e.g.*, R. 807-09, ¶¶ 3-12.) Thus, Hanson's negligent repair of the hose created the very hazard that killed Mr. Normandeau.

Hanson claims that, under "traditional negligence analysis," a vehicle repair shop owes no duty of care to a tow truck driver.[24] Hanson also claims that the plaintiffs "do not state what legal duty was owed to" their decedent.[25]

In fact, traditional negligence law shows that Hanson owed Mr. Normandeau a duty of care. The duty Hanson owed to Mr. Normandeau is the duty that all people owe to others--a duty to use reasonable care to avoid causing

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[24] Appellants' Br. at 5.

[25] *Id.* at 6.

them harm: "The default rule is that everyone owes a duty of reasonable care to others to avoid physical harms."[26]

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[26] 1 DAN B. DOBBS, THE LAW OF TORTS § 227 (Supp. 2008) (footnote omitted). *See also id.* § 117, at 277 (2001) (as a general rule, all people owe a duty "to exercise the care that would be exercised by a reasonable and prudent person under the same or similar circumstances to avoid or minimize risks of harm to others") (footnotes omitted); *Hamilton v. Accu-Tek,* 62 F. Supp. 2d 802, 818 (E.D.N.Y. 1999) ("In the usual run of cases, a general duty to avoid negligence is assumed, and there is no need for the court to undertake detailed analysis of precedent and policy.") (citations omitted), *vacated,* 264 F.3d 1 (2d Cir. 2001), *and effectively overruled on the merits by Hamilton v. Beretta U.S.A. Corp.,* 750 N.E.2d 1055 (N.Y. 2001); *Lugtu v. California Highway Patrol,* 28 P.3d 249, 256 (Cal. 2001) ("Under general negligence principles, . . . a person ordinarily is obligated to exercise due care in his or her own actions so as to not create an unreasonable risk of injury to others"); *Neighbarger v. Irwin Indus., Inc.,* 882 P.2d 347, 350 (Cal. 1994) ("We all have the duty to use due care to avoid injuring others.") (citation omitted); *Remy v. MacDonald,* 801 N.E.2d 260, 262-23 (Mass. 2004) ("As a general principle of tort law, every actor has a duty to exercise reasonable care to avoid physical harm to others."); *Iglehart v. Board of County Comm'rs,* 2002 OK 76, ¶ 10, 60 P.3d 497 (recognizing "the traditional common-law rule that whenever one person is by circumstances placed in such a position with regard to another, that, if he . . . did not use ordinary care and skill in his . . . own conduct, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger"); *Wolford v. Eastern State Hosp.,* 795 P.2d 516, 519 (Okla. 1990) ("As a general rule a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct with respect to all risks which make the conduct unreasonably dangerous.'") (citations omitted). *See also* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 6 cmt. *b* (Tentative Draft No. 1, 2005) ("Ordinarily, an actor whose conduct creates risks of physical harm to others has a duty to exercise reasonable care."). *Cf. Palsgraf v. Long Island R.R. Co.,* 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.").

Courts usually constrict this general duty of care in very limited circumstances:[27]

> (1) when the plaintiff claims economic or dignitary harm, not personal injury or property damage; (2) when the defendant is perceived as having committed no relevant affirmative act; (3) when the defendant's duty is thought to be based upon his special relationship or undertaking; (4) when a duty to the plaintiff would potentially conflict with a preexisting duty to another; and (5) when the courts believe they know that the plaintiff has consented to some inherent risk in dealing with the defendant.[28]

None of these situations exist in this case. The plaintiffs were not claiming economic or dignitary harm; the harm they suffered was the death of their husband and father. The defendant's liability was not based on its failure to act but on its affirmative acts in negligently repairing the hydraulic line on the Ryder truck. The defendant's duty was not based on a special relationship.[29]

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[27] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 6 (Discussion Draft Apr. 5, 1999) ("Findings of no duty are unusual, and are based on judicial recognition of special problems of principle or policy that justify the withholding of liability.").

[28] 1 DOBBS, *supra* note 26, § 227 (Supp. 2008) (footnotes omitted). Although courts sometime say that the defendant owed the plaintiff "no duty" in such cases, "they usually mean only that the defendant owed no duty *that was breached* or that he owed no duty *that was relevant on the facts.*" *Id.*

[29] For that reason, the special relationship cases that Hanson relied on before the trial court (*see* R. 627-28) and in point I.C of its brief are irrelevant. *See Normandeau*, 2009 UT 44, ¶ 21 ("in this case, there is no specific relationship test to be applied to determine whether Hanson owed Mr. Normandeau a duty").

Recognizing that Hanson owed Mr. Normandeau a duty would not conflict with a preexisting duty to anyone else but is consistent with the duties that Hanson admits it owed to others. And Mr. Normandeau did not consent to any inherent risk in dealing with Hanson.

Hanson claims that, "[i]n wrestling with whether a duty was owed in this case, the Utah Supreme Court provided some guidance to the analysis of when a duty is created."[30] The Utah Supreme Court did not "wrestle" with whether a duty was owed in this case. It left that issue for this court to decide. It merely held that Hanson had properly preserved the issue for appeal.

The supreme court did say, however: "A court determines whether a duty exists by analyzing [1] the legal relationship between the parties, [2] the foreseeability of injury, [3] the likelihood of injury, [4] public policy as to which party can best bear the loss occasioned by the injury, and [5] other general policy

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The specific relationship cases apply when the plaintiff is claiming that the defendant is liable for failing to perform a gratuitous undertaking or failing to control the conduct of a third person. *See, e.g., Webb v. University of Utah*, 2005 UT 80, ¶ 10, 125 P.3d 906; RESTATEMENT (SECOND) OF TORTS ch. 12, topic 7, scope note (1963 & 1964). Those are not the plaintiffs' claims in this case. The plaintiffs' claim is that Hanson's own negligence in performing a task for which it was compensated (*see* R. 116, ¶ 15, & 118) caused the death of their husband and father.

[30] Appellant's Br. at 6.

considerations."[31] All of those factors support the trial court's conclusion that Hanson owed Mr. Normandeau a duty on the facts of this case.

1. *The Legal Relationship Between the Parties.*

The fact that Hanson and Mr. Normandeau did not have a preexisting relationship does not mean that Hanson owed Mr. Normandeau no duty of care. The existence of a relationship between the parties "is usually one of the grounds for imposing a duty of reasonable care, *but the absence of a relationship is usually not a ground for ruling out a duty of care.*"[32]

Negligence law, as originally developed at common law, was initially reserved for consented-to contacts that went awry. Thus, it originally involved parties who had some relationship to each other, by contract or status.[33] But by

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[31] 2009 UT 44, ¶ 19 (citing *AMS Salt Indus. Inc. v. Magnesium Corp. of Am.*, 942 P.2d 315, 321 (Utah 1997)). Professor Dobbs has noted that such factors, variously stated by different courts, "are so numerous and so broadly stated that they can lead to almost any conclusion. . . . More importantly, . . . they are mainly the very same factors that determine the negligence question." 1 DOBBS, *supra* note 26, § 229, at 583 (2001). Professor Dobbs concludes: "Given the similarity between the duty factors decided by the judge and the negligence factors decided by the jury, it may be appropriate to wonder whether judges are in a position to shape refined limited duty rules without taking over the jury role." *Id.*

[32] 1 DOBBS, *supra* note 26, § 229, at 179 (Supp. 2008) (emphasis added).

[33] *See generally id.* § 111 (2001).

the 1800s, negligence law had been extended to strangers, and "the negligence standard necessarily cease[d] to arise from the parties' relationship."[34] Thus, as Hanson conceded at the hearing on its motion for summary judgment, Hanson could be liable to the occupants of the vehicle, to other motorists, to pedestrians, and to owners of other vehicles parked on the side of the road--all people with whom Hanson had no relationship--if its negligent repair caused the driver of the truck to lose control over the vehicle. (R. 629 & R. 2078, at 34:11-20, 41:14-42:1.)

In any event, there was a relationship between Hanson and Mr. Normandeau--that of a repairer of a chattel and one whom the repairer should expect to use it or be endangered by its probable use.

The law is well settled that one who repairs a product owes a duty to those who could foreseeably be injured by a negligent repair.[35] And, as explained in

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[34] *Id.* at 262.

[35] *E.g., Winans v. Rockwell Int'l Corp.*, 705 F.2d 1449, 1453 (5th Cir. 1983) (repairers of products are required to use reasonable care in proportion to the foreseeable danger) (applying Louisiana law); *Vrooman v. Beech Aircraft Corp.*, 183 F.2d 479, 481 (10th Cir. 1950) ("the rule of liability has been made generally applicable to one who, as an independent contractor negligently . . . repairs a chattel for another") (citations omitted); *Levine v. Sears Roebuck & Co.*, 200 F. Supp. 2d 180, 186-87 (E.D.N.Y. 2002) (a person who undertakes repairs has a duty of care to act reasonably to protect against foreseeable risks) (applying New York law); *Seo v. All-Makes Overhead Doors*, 119 Cal. Rptr. 2d 160, 169 (Ct. App. 2002) ("An independent contractor repairer may owe a duty to a third party injured by

the next section, Mr. Normandeau was someone who could foreseeably be injured by a negligent repair.

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the equipment repaired if . . . the repairer negligently performs the repair causing the third party's injury"); *Jackson v. Ryder Truck Rental, Inc.*, 20 Cal. Rptr. 2d 913, (Ct. App.) (contractor who failed to maintain the electrical system of a truck, causing the truck driver to have to stop by the side of the road, where he was hit and killed by another car, owed a duty of care to the driver), *review denied* (Cal. 1993); *Moody v. Martin Motor Co.*, 46 S.E.2d 197, 200 (Ga. Ct. App. 1948) ("an independent contractor who repairs an article or machine" "owes an original duty . . . not to endanger the lives and limbs of others by the negligent performance of a contract, when the consequences of such conduct may be foreseen"); *Central & S. Truck Lines v. Westfall GMC Truck, Inc.*, 317 S.W.2d 841, 844-46 (Mo. Ct. App. 1958) (independent contractors can be liable to third parties for negligent repairs to motor vehicles) (citations omitted); *Zierer v. Daniels,* 122 A.2d 377, 378-79 (N.J. Super. Ct. App. Div. 1956) ("he who repairs a chattel is bound to exercise reasonable care not to cause bodily harm or damage to one whose person or property may reasonably be expected to be endangered by the probable use of the chattel after the making of the repair"; "[u]nder this rule, one who negligently repairs an automobile at the request of the owner had been held liable to a third person."); *Barnhart v. Freeman Equip. Co.*, 441 P.2d 993, 997 (Okla. 1968) (a repairer owes a duty to foreseeable users of the product to perform the repairs properly). *See also* RESTATEMENT (SECOND) OF TORTS §§ 404 (one who negligently repairs a chattel is subject to the same liability as a negligent manufacturer of the chattel); 395 (one who negligently manufactures a chattel that is dangerous unless carefully made is subject to liability to those who use it for a purpose for which the manufacturer should expect it to be used and to those whom he should expect to be endangered by its probable use); 398 (a manufacturer of a chattel made under a plan or design that makes it dangerous for the uses for which it is manufactured is subject to liability to others whom he should expect to use the chattel or be endangered by its probable use).

2. *The Foreseeability of Injury*

Hanson's main argument before the trial court was that the injury to Mr. Normandeau was not foreseeable. (*E.g.*, R. 2078, at 33:25-34:2 ("There really aren't any other factors to consider in this case as to whether a duty was owed, except for the foreseeability."). What is required to be foreseeable is the general nature of the harm, not the specific mechanism of the harm or the particular accident.[36]

Hanson conceded that it was foreseeable that, if it did a negligent repair, the hose would fail and that the truck would go into "self-preservation" mode and pull over to the side of the road (R. 2078, at 34:3-10); that the vehicle would have to be towed (R. 2078, at 35:1-14, 42:16-17); that, before it could be towed, the drive line would have to be disconnected (R. 2078, at 35:15-19, 36:4-8); and that, because of the way the truck was designed, there could be substantial torque on the drive line (R. 2078, at 36:9-18). As an authorized dealer, supplier, and

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[36] *Normandeau*, 2009 UT 44, ¶ 20. *See also Bigbee v. Pacific Tel. & Tel. Co.*, 665 P.2d 947, 952 (Cal. 1983) ("'foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct. . . . One may be held accountable for creating even '"the risk of a slight possibility of injury if a reasonably prudent [person] would not do so."'") (citations omitted).

repairer of the type of truck involved in this case (*e.g.*, R. 2082, at 122:18-123:7; R. 2078, at 48:23-49:2), Hanson knew or should have known that a negligent repair of the hose would cause excessive torque to build up in the drive line.

The only thing that Hanson claimed was unforeseeable was that Mr. Normandeau would not do his job right by checking for and releasing the built-up torque in the drive line before trying to tow the truck. (*See* R. 2078, at 34:18-25; 37:11-22; 42:19-22, 51:21-24.) There were disputed issues of material fact as to whether Mr. Normandeau was or should have been aware of the tremendous additional torque that would be present in the drive line as a result of Hanson's negligent repair (*see, e.g.*, R. 813-14, ¶¶ 5-12) and whether he checked for and tried to release the torque in the drive line before towing the vehicle (*see* R. 814, ¶¶ 10 & 12; 831-39; 846-51), precluding summary judgment on that ground. The trial court properly let that issue go to the jury, and the jury found against Hanson on that issue. It found that Mr. Normandeau was not negligent in the way he went about his job. (*See* R. 1683, ¶ 5.) In any event, a subsequent negligent (or even criminal) act of another is not unforeseeable as a matter of law.[37]

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[37] *E.g., Cruz v. Middlekauff Lincoln-Mercury, Inc.*, 909 P.2d 1252, 1255-57 (Utah 1996); *Williams v. Melby*, 699 P.2d 723, 728-29 (Utah 1985); *Godesky v. Provo*

3. The Likelihood of Injury

Hanson's negligence increased the likelihood of injury to someone in Mr. Normandeau's position, that is, the chance that he would be injured.[38]

For purposes of its summary judgment motion, Hanson did not dispute that its repair of the hose in the Ryder truck was negligent. (*See, e.g.*, R. 631.) Hanson's negligent repair caused the truck's hydraulic line to leak, and the loss of hydraulic fluid not only caused the truck to lose power steering but also caused the drive-line parking brake to engage, which stopped the drive line from turning and caused torque to build up in the drive line. Because of Hanson's negligent repair, the truck had to be towed. And before he could tow the truck, Mr. Normandeau had to disengage the drive line. The substantial built-up and unseen torque in the drive line created a significant risk of harm to anyone working on or near the drive line. (*See* R. 808-09, ¶¶ 8-13.) It was "very, very common" for a tow-truck driver to try to remove the drive line the way Mr.

City Corp., 690 P.2d 541, 545 (Utah 1984); *Harris v. Utah Transit Auth.*, 671 P.2d 217, 222 (Utah 1983); RESTATEMENT (SECOND) OF TORTS §§ 447-49.

[38] *See, e.g.*, Cambridge Dictionaries Online ("likelihood" means "the chance that something will happen"), on-line at http://dictionary.cambridge.org/define.asp?key=46204&dict=CALD (last visited Dec. 7, 2009).

Normandeau did. (R. 847, ¶ 31; 908, at 102:4-12.) Thus, injury to someone in Mr. Normandeau's place was more likely than an injury to others to whom Hanson conceded it owed a duty--the occupants of the vehicle and other motorists.

4. Public Policy as to Which Party Can Best Bear the Loss

Hanson argues:

> To extend a duty of care to a tow truck driver due to negligent repairs made by a mechanic would essentially burden mechanics shop[s] with the obligation to compensate tow truck drivers for injuries suffered while doing their job. Repair shops are not insurers of tow truck drivers--to operate, towers are required to purchase hefty insurance policies for their hazardous jobs, and the onus of responsibility for following proper procedure is best placed on them.[39]

To find that Hanson owed Mr. Normandeau a duty in this case would not make repair shops insurers for tow truck drivers any more than finding that a repair shop that negligently fixes a car's brakes is an insurer for all other motorists and pedestrians on the road. In each case, the repair shop is only liable for the injuries its negligence proximately causes. That is the public policy behind tort law--to hold tortfeasors accountable for the harm caused by their own fault.[40]

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[39] Appellant's Br. at 9.

[40] *See, e.g.,* UTAH CODE ANN. §§ 78B-5-818 & -820. *See also, e.g., State Farm Fire & Cas. Co. v. Hartford Ins. Co. of S.E.,* 631 So.2d 30, 32 (La. Ct. App.) ("To place the primary liability for an accident upon the party who is the most

Public policy dictates that, as between a negligent tortfeasor and an innocent plaintiff, the loss should fall on the tortfeasor.[41]

There is absolutely no evidence or foundation for Hanson's bald assertion that "towers are required to purchase hefty insurance policies for their hazardous jobs," and Hanson cites no authority for its assertion. Similarly, there is no evidence that Mr. Normandeau was covered by insurance. If his employer was in fact "required to purchase hefty insurance policies" covering its towing operations, that insurance would not have provided coverage for Mr. Normandeau or his heirs. Their exclusive remedy against Mr. Normandeau's employer is workers' compensation.[42]

Moreover, whatever liability insurance Mr. Normandeau's employer may have had would not have covered harm caused by Hanson's fault.

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responsible for the loss and who was in the best position to have avoided the incident could be considered sound public policy which encourages the negligent party to exercise due care.") (citation omitted), *writ denied,* 635 So.2d 1108 (La. 1994); *Nabors Drilling, U.S.A., Inc. v. Escoto,* 288 S.W.3d 401, 404 (Tex. 2009) ("'the public policy behind the law of negligence . . . dictates every person is responsible for injuries which are the reasonably foreseeable consequence of his act or omission'") (citation omitted).

[41] *See Fordham v. Oldroyd,* 2007 UT 74, ¶ 17, 171 P.3d 411 (referring to "the foundational tort law principle that, as between an innocent party and a negligent one the loss should fall on the negligent party").

[42] *See* UTAH CODE ANN. § 34A-2-105(1).

If the existence of insurance for the death of Mr. Normandeau is relevant at all, it favors finding a duty on the part of Hanson. While there was no evidence that Mr. Normandeau's employer was heavily insured, Hanson *is* fully insured for its liability to the plaintiffs.[43]

But the existence or nonexistence of insurance here is irrelevant. In a case like this the law does not take into consideration whether or not the plaintiff had insurance in holding wrongdoers accountable for the harm they have caused.[44] Taken to its logical extreme, Hanson's argument would mean that no driver would owe any duty of care to any other driver on the road because all drivers are required to buy insurance for the hazardous activity of driving a car.[45]

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[43] *See* Def. Hanson Equip. Inc.'s Mem. in Supp. of Its Mot. to Stay Execution of Judg't Pending Appeal, filed Apr. 30, 2007, and included in vol. 5 of the Record, at 2, ¶ 2 ("Defendant Hanson Equipment is insured with Harco National Insurance Company, and the amount of the judgment was within Hanson Equipment's insurance policy limit.").

[44] *See, e.g., DuBois v. Nye,* 584 P.2d 823, 825 (Utah 1978) (a defendant cannot avoid liability on the ground that the damage he caused has been paid by insurance; the collateral source rule "provides that a wrongdoer is not entitled to have damages, for which he is liable, reduced by proof that the plaintiff has received or will receive compensation or indemnity for the loss from an independent collateral source").

[45] *See* UTAH CODE ANN. §§ 41-12a-301(2)-(4) & -103(9).

Hanson's argument that "the onus of responsibility for following proper procedure is best placed on" tow truck drivers is similarly unavailing. The plaintiffs are not trying to hold Hanson liable for any harm caused by Mr. Normandeau not "following proper procedure." Whatever harm Mr. Normandeau caused himself is not Hanson's responsibility.[46] In any event, the jury found that Mr. Normandeau was not at fault in causing his death but that Hanson bore sole responsibility for his death. (R. 1683, ¶ 7.)

In short, public policy does not demand that, as between a negligent tortfeasor who is fully insured for any liability and the widow and children of the man killed by the tortfeasor's negligence, the widow and children "can best bear the loss occasioned by the injury."[47]

5. Other General Policy Considerations

Hanson has not identified any other policy considerations that would justify shifting responsibility for its negligence from Hanson, the tortfeasor, to Mr. Normandeau's widow and children, and the plaintiffs are not aware of any.

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[46] *See id.* §§ 78B-5-818 & -820.

[47] *See Normandeau*, 2009 UT 44, ¶ 19.

B. Hanson's "Case on Point" Is Not.

Hanson claims that *Reimer v. City of Crookston*[48] is "on point" in holding that a prior repair shop owes no duty of care to subsequent mechanics. Curiously, if Hanson thought *Reimer* was "on point," one would have thought that it would have cited it more than in a single, passing "*See, e.g.,*" reference in the six briefs it has already filed on appeal (two in this court the first time around, its petition for writ of certiorari and reply, and its brief and reply brief in the Utah Supreme Court).[49] As Hanson itself recognizes,[50] *Reimer* is distinguishable on its facts.

In that case, Mr. Reimer, a boiler repair expert, was badly burned when he accidentally brushed up against a corroded nipple on a school swimming pool boiler and the nipple broke off, spraying Mr. Reimer with pressurized hot water and steam. Mr. Reimer sued, among others, Johnson Controls, a company that had performed previous maintenance services on the boiler. However, none of

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[48] 326 F.3d 957 (8th Cir. 2003).

[49] *See* Appellant's Br., Jan. 19, 2007, at 17 (citing *Reimer* for the proposition that the "fact that on occasion defendant would do work on [a] boiler does not create a duty on its part to anyone down the line who may be harmed by the boiler").

[50] *See* Appellant's Br., Oct. 26, 2009, at 10.

those repairs involved the corroded nipple--the part that broke.[51] In fact, earlier that day, the head custodian for the school had asked a Johnson employee to tighten the nipple, and the employee refused because the nipple was corroded and appeared unsafe; moreover, it was not part of his contract-related maintenance work.[52] The court held that Johnson Controls could not be liable because it was not responsible for the corroded nipple that broke.[53] Hanson concedes as much, but claims "this is of no consequence."[54]

Unlike Hanson's repair in this case, Johnson Controls' work in *Reimer* had nothing to do with the part that failed and did not directly cause the failure. It would take a major extension of tort law to hold a repairman liable in negligence for the failure of a part it had nothing to do with. Hanson, on the other hand, *was* responsible for the part that broke (the hose that carried the hydraulic fluid for the parking brake and power steering). Hanson's negligent repair caused the

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[51] *See* 326 F.3d at 965 ("It is undisputed that the contract did not include repair or maintenance of the boiler nipples nor did Johnson Controls ever work on the nipple that caused Mr. Reimer's injury").

[52] *See id.* at 960.

[53] *See id.* at 965-66.

[54] Appellants' Br. at 10 ("Johnson Controls' repairman never worked on the part that broke and caused injury, but this is of no consequence.").

hose to fail, which directly caused drive-line torque to build up and also required that the drive line be disconnected. The jury found that Hanson's negligent repair was the proximate cause of Mr. Normandeau's death.

Other courts have had little trouble recognizing that one who repairs a product owes a duty to those who could foreseeably be injured by a negligent repair.[55]

II.

HANSON HAS WAIVED ANY ARGUMENT BASED ON THE PROFESSIONAL RESCUER DOCTRINE.

Hanson argues that the so-called professional rescuer doctrine is "[a]nalagous" [sic] to this case.[56] Hanson is precluded from even making this argument.

Hanson never raised the professional rescuer doctrine as an affirmative defense. (*See* R. 304-18.) In moving for summary judgment, Hanson never mentioned the professional rescuer doctrine, either in its briefs or in its oral argument. (*See* R. 612-37; 2078.) Although Utah had not officially adopted the

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55 *See supra* note 35 and authorities cited therein.

56 Appellants' Br. at 12.

professional rescuer doctrine at that time, it was a well-recognized doctrine of tort law that Hanson could have argued for.[57]

After the case was tried to a jury and a judgment was entered, Hanson moved for a new trial or for a remittitur but did not raise the professional rescuer doctrine in its post-judgment motion either. (*See* R. 1692-94.) After the plaintiffs had responded to that motion and after the time for moving for a new trial had passed,[58] Hanson filed, without leave of court, a "Supplemental Briefing in Support of Defendant's Motion for a New Trial," raising for the first time the issue of the professional rescuer doctrine (*see* R. 1847-52), even though it had nothing to do with any of the grounds that Hanson had moved for a new trial on

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[57] *See Fordham v. Oldroyd*, 2006 UT App 50, ¶ 10, 131 P.3d 280 ("For over a century, this rule has been adopted by the vast majority of jurisdictions that have considered it."), *aff'd*, 2007 UT 74, 171 P.3d 411. *See also Fordham*, 2007 UT 74, ¶ 22 (Wilkins, Assoc. C.J., concurring & dissenting) (noting that the concept first arose in 1892, in *Gibson v. Leonard*, 32 N.E. 182 (Ill. 1892), *overruled by Dini v. Naiditch*, 170 N.E.2d 881 (Ill. 1960)).

[58] *See* UTAH R. CIV. P. 59(b) (a motion for new trial must be served within 10 days after entry of the judgment).

(*cf.* R. 1692-94).[59] The trial court denied Hanson's motion on the merits, finding the doctrine inapplicable in this case. (*See* R. 2024-25, ¶¶ 29-34.)

Hanson appealed. In its docketing statement on appeal, Hanson stated one of the issues for appeal as, "Does the professional rescuer doctrine, adopted by the Utah Court of Appeals in *Fordham v. Oldroyd*, 2006 UT App 50, 131 P.3d 280, *certorari* [sic] *granted* 138 P.3d 589, bar plaintiff's claims against Hanson?"[60] Curiously, however, Hanson never mentioned the doctrine again until it filed its latest brief, after remand from the Utah Supreme Court. Hanson had eight opportunities to raise the doctrine after mentioning it in its docketing statement, but it never did--not in its opening brief in this court, not in its reply brief in this court, not at oral argument in this court, not in its petition for a writ of certiorari, not in its reply brief on its petition for a writ of certiorari, not in its principal brief in the Utah Supreme Court, not in its reply brief in the Utah Supreme Court, and

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[59] *Cf. Arkwright Mut. Ins. Co. v. Philadelphia Elec. Co.*, 427 F.2d 1273, 1276 (3d Cir. 1970) (a court is without authority to grant a new trial for reasons assigned after the mandatory 10-day period for moving for a new trial under rule 59(b)); *Brest v. Philadelphia Transit Co.*, 24 F.R.D. 47, 48 (E.D. Pa. 1959) ("it is plain that under [rule 59(b)] . . . additional reasons for a new trial served later than ten days have no effect and cannot be considered by the Court").

[60] Docketing Statement at 3, ¶ (c)(7)(iii).

not at oral argument in the Utah Supreme Court. Hanson's efforts to resurrect the issue now are too little too late.

It is well established that issues not properly raised in the trial court may not be raised for the first time on appeal,[61] and "reference to an issue in post-trial motions is insufficient to raise an issue not previously raised."[62] Moreover, issues not raised in the court of appeals may not be raised on certiorari to the supreme court;[63] and issues not previously raised on appeal may not be raised on remand.[64] As the Federal Circuit has explained, appellate courts sit to review judgments, not opinions:

> This responsibility can be properly discharged only if the court assumes that the appellant has fully set forth its attack on the judgment below . . . . In other words, the court is entitled to assume that an appellant has raised all issues it deems important against a judgment appealed from. An issue that falls within the scope of the

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[61] *E.g., State v. Irwin,* 924 P.2d 5, 7 (Utah Ct. App. 1996), *cert. denied,* 931 P.2d 146 (Utah 1997).

[62] *LeBaron & Assocs. v. Rebel Enters., Inc.,* 823 P.2d 479, 484 (Utah Ct. App. 1991) (citations omitted).

[63] *E.g., DeBry v. Noble,* 889 P.2d 428, 444 (Utah 1995).

[64] *See supra* note 3 and cases cited therein.

> judgment appealed from but is not raised by the appellant in its opening brief on appeal is necessarily waived.[65]

"To hold otherwise," the court explained,

> would allow appellants to present appeals in a piecemeal and repeated fashion, and would lead to the untenable result that "a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."[66]

Utah Rule of Appellate Procedure 24(a)(9) requires the argument section of a brief on appeal to "contain the contentions and reasons of the appellant with respect to the issues presented, . . . with citations to the authorities, statutes, and parts of the record relied on." Hanson never raised the professional rescuer doctrine in any of its briefs on appeal. It has therefore waived the issue.[67] To

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[65] *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999).

[66] *Id.* at 1382-83 (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982)).

[67] *Cf. Guttman v. New Mexico*, 325 Fed. Appx. 687, 693 (10th Cir. 2009) (even though *Younger* abstention may be raised for the first time on appeal, the defendant waived its abstention argument by not raising it when it had "numerous opportunities" to do so on appeal); *Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) (appellant waived appellate review of issues and arguments that were insufficiently raised in its opening brief) (applying Fed. R. App. P. 28(a)(9)(A), which is substantively the same as Utah R. App. P. 24(a)(9)); *Utah Environmental Congress v. Bosworth*, 439 F.3d 1184, 1194 n.2 (10th Cir. 2006) (even where an issue is mentioned in a brief on appeal, it is waived if not substantively addressed); *DeBry v. Noble*, 889 P.2d 428, 444 (Utah 1995) (issues not raised on

allow Hanson to now argue the professional rescuer doctrine would allow it to "present its appeals in a piecemeal and repeated fashion," hoping that the third time around will be the charm. Hanson, who chose not to argue the point on its first appeal or to raise it in the Utah Supreme Court, should not be allowed to stand in a better position than it would have been in had it properly raised it before and lost.

III.

THE PROFESSIONAL RESCUER DOCTRINE DOES NOT APPLY IN THIS CASE IN ANY EVENT.

Hanson apparently concedes that the professional rescuer doctrine does not apply in this case, since it argues only that it is "[a]nalagous" [sic].[68] That is because, in adopting the professional rescuer doctrine in Utah, the Utah Supreme Court limited its application to "professional rescuers who, like firefighters and

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appeal in the court of appeals and that the court did not address may not be raised on certiorari unless the issue arose out of the court of appeals' decision); *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 445 n.31 (Utah 1993) (refusing to reach new points raised for the first time on appeal and declining to honor the distinction between "new arguments as opposed to new issues").

[68] Appellants' Br. at 12.

police officers, are public employees."[69] Mr. Normandeau was not a public employee.

The rule also does not apply for another reason. As Hanson notes, the professional rescuer rule "'bars those engaged in rescue work as part of their employment from recovering damages for injuries sustained on the job *as a result of the negligence of the person rescued.*'"[70] As the Utah Supreme Court noted in adopting the rule, one policy reason in favor of the rule is that the law should not discourage imperiled citizens from summoning aid.[71] That rationale does not help Hanson because Hanson was not the party in need of rescuing or the party who summoned Mr. Normandeau. The person rescued was Kristen Marion, the person who rented and drove the truck, not Hanson.

Hanson argues that, because Mr. Normandeau's "chosen profession is inherently dangerous," the professional rescuer doctrine should extend to him as well.[72] Yet, as Hanson also notes, "[o]ther inherently dangerous professions

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[69] *Fordham v. Oldroyd,* 2007 UT 74, ¶ 14, 171 P.3d 411 (noting that "it is not necessary to do more to reach the result in this case").

[70] Appellant's Br. at 12 (emphasis added) (quoting 57A AM. JUR. 2D *Negligence* § 782 (2004)).

[71] *See* 2007 UT 74, ¶ 8.

[72] Appellant's Br. at 13-14.

include roofers, electricians, pilots, farmers, and construction workers, to name a few."[73] Hanson's argument would mean that anyone who called any of these other professionals for help would not owe them a duty either. That is not the law.[74] If an electrician, roofer, or pilot, for example, is injured through another's negligence, the other is subject to liability to him or her. It should be no different for a tow truck driver.

Hanson argues that tow truck drivers are surrounded by vehicles moving at high speeds and are subject to inclement weather, poor road conditions, and working in the dark at nighttime, "just like highway patrolmen are."[75] But while inclement weather and vehicles moving too fast for conditions caused the state trooper's injuries in *Fordham*, none of those "hazardous working conditions" had anything to do with Mr. Normandeau's death. The hazard that killed him was not the result of bad weather or other drivers but of Hanson's negligent repair.

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[73] *Id.* at 14.

[74] *See, e.g., Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 350 (Cal. 1994) ("The duty to avoid injuring others normally extends to those engaged in hazardous work. Thus, for example, both publicly and privately employed highway workers, who face the obvious occupational hazard of working in the middle of traffic, may recover for injuries caused by a third party's negligent driving.") (citations omitted).

[75] Appellant's Br. at 14.

Hanson argues that, in these "hazardous jobs," "the pay reflects the hazards undertaken and expensive workers compensation benefits are provided."[76] Again, Hanson has pointed to no evidence that Mr. Normandeau was highly compensated for having to face hazards, nor was there any evidence of "expensive workers compensation benefits." In fact, workers' compensation benefits are set by statute and represent a trade-off: the worker or his family receives less than one might expect from a tort recovery in exchange for a speedy recovery and being relieved of the responsibility of having to prove that the employer was at fault.[77] In any event, the supreme court held in *Fordham* that the availability of insurance was irrelevant to its adoption of the professional rescuer doctrine.[78]

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[76] *Id.*

[77] *See, e.g., Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 140 (1956) (Black, J., dissenting) (one of the early workers' compensation acts--that governing longshoremen--was opposed by many workers at first because they lost "their chance to get big tort verdicts"; but "Congress thought it best to give them a more certain and less expensive recovery, even though far less in amount than some tort recoveries might be"); *Workers' Compensation Fund v. Wadman Corp.*, 2009 UT 18, ¶ 8, 210 P.3d 277 (the purpose of workers' compensation is to provide compensation to injured employees by a simple and speedy procedure that eliminates the expense, delay and uncertainty in proving fault).

[78] *See* 2007 UT 74, ¶ 16.

What the court in *Fordham* did find significant was the nature of the relationship between public servants such as police officers and fire fighters on the one hand and members of the public on the other hand: "The nature of the rescuer-rescued relationship is one that contemplates allocation of costs across society generally for injuries sustained by professional rescuers."[79] "Notably," the court added,

> the consequences for an injured professional rescuer who is a public employee may be less unfair than those that would befall a private party . . . because responsible citizens can, and should, see to it that their public officials fairly compensate those firefighters, police officers, and others who are called upon to confront hazards as part of their callings.[80]

The cost of injuries to employees of private towing businesses are not allocated "across society generally," the way they are for public servants like police officers and firefighters. Private tow truck drivers are not "fairly compensate[d]" by public officials. Extending the professional rescuer doctrine to Mr. Normandeau would be unfair because it would leave his heirs at the mercy of private charity while Hanson, the tortfeasor, who has more than sufficient liability insurance to pay for the damage it has caused, would escape responsibility for its actions.

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[79] *Id.* ¶ 17.

[80] *Id.*

As Hanson notes, the court in *Fordham* barred Fordham's claims since "all Oldroyd did [was] cause the need for the services of a rescuer."[81] Hanson then claims "all that can be said [about it] is that the bad repair by Hanson Equipment caused the need for a tow truck operator to tow" the truck.[82] In fact, Hanson's negligence did more than just cause the need for a tow truck; it created the very hazard that killed Mr. Normandeau. There was no question in *Fordham* that the driver of the car that actually struck Trooper Fordham could be liable for the injuries she caused.[83] Similarly, if a police officer or a tow truck driver were injured by the fault of another after he arrived on the scene, such as if he were assaulted, robbed, run over, or had his vehicle hijacked, there is no question that the party who caused the harm would be liable to him. As the trial court correctly concluded:

> The professional rescuer doctrine also does not excuse Hanson's liability in this case because the evidence presented at trial supports the jury's finding that Hanson's negligence not only caused the [Ryder] truck to break down, requiring that it be towed, but also created the very hazard that materialized to kill Mr. Normandeau--

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81 Appellant's Br. at 14.

82 *Id.*

83 *See Fordham,* 2006 UT App 50, ¶ 5, n.1 (before filing the action against Oldroyd, Fordham settled with the driver of the vehicle that struck him for her insurance policy limits).

> namely, the built-up torque in the driveline of the truck. The professional rescuer doctrine does not relieve a tortfeasor from liability where the tortfeasor's negligence directly caused the plaintiff's harm.

(R. 2025, ¶ 34.)

Finally, Hanson argues that California has applied the professional rescuer doctrine to tow truck drivers. California's experience in applying the doctrine to tow truck drivers shows why the doctrine should not apply in this case.

In *Holland v. Crumb,*[84] a panel of the California Court of Appeals held that "the 'firefighter's rule' bar[red] the claim of a privately employed tow truck driver who was injured during the normal discharge of his duties at the scene of a freeway automobile accident."[85] The court based its holding on its view that the "application of the firefighter's rule depends on the inherent dangers associated with one's employment" and found that "the risk of being hit from passing traffic is inherent in the performance of the normal and usual duties of a tow truck driver rendering aid to inoperable cars which may be stranded on freeways or streets."[86]

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[84] 32 Cal. Rptr. 2d 366 (1994).

[85] *Id.* at 366.

[86] *Id.* at 369-70.

The California Supreme Court expressly rejected the reasoning of the court of appeals just three months later, in *Neighbarger v. Irwin Industries, Inc.*[87] Given the California Supreme Court's clear rejection of the rationale for *Holland,* the statement by another panel of the California Court of Appeals that *Neighbarger* "does not overrule the holding in *Holland,*"[88] while perhaps technically correct, does not justify this court in following *Holland.*[89]

The court in *Neighbarger* held that private safety employees could state a claim against a third party whose negligence started a fire that injured them. The court explored the public policy reasons for the firefighter's rule and concluded that the policy reasons for the rule in the context of public employees did not apply in the private sector. The fact that public and private safety officers are

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[87] 882 P.2d 347, 356 n.4 (Cal. 1994) ("We . . . reject the reasoning of the court in *Holland v. Crumb* . . . applying the firefighter's rule to the claim of a privately employed tow truck driver on the theory that a tow truck driver must assume the foreseeable risks of such hazardous employment.").

[88] *Dyer v. Superior Court of Los Angeles County,* 65 Cal. Rptr. 2d 85, 88 (Ct. App. 1997).

[89] *See id.* at 89 ("Although the *Neighbarger* footnote leaves the holding in *Holland* intact, we decline to treat *Holland* as persuasive precedent."). *Dyer* itself is distinguishable because the tow-truck driver in that case had a contract-based obligation to provide help to the defendant in case of a mechanical breakdown. *See* 65 Cal. Rptr. 2d at 89. Here, there was no contractual relationship between Hanson and Mr. Normandeau.

both employed "to confront and control hazards that may be created by the negligence of others" does not justify treating them the same: "the firefighter's rule was not intended to bar recovery for all hazards that are foreseeable in the employment context, but to eliminate the duty of care to a *limited* class of workers, the need for whose employment arises from certain inevitable risks that threaten the public welfare."[90] As the court explained, a defendant stands in a different relation to a private safety worker than members of the public stand in relation to public servants:

> When the firefighter is publicly employed, the public, having secured the services of the firefighter by taxing itself, stands in the shoes of the person who hires a contractor to cure a dangerous condition. In effect, the public has purchased exoneration from the duty of care and should not have to pay twice, through taxation and through individual liability, for that service. [Citations omitted.] But when a safety employee is privately employed, a third party lacks the relationship that justifies exonerating him or her from the usual duty of care. The third party, unlike the public with its police and fire departments, has not provided the services of the private safety employee. Nor has the third party paid in any way to be relieved of the duty of care toward such a private employee. Having no relationship with the employee, and not having contracted for his or her services, it would not be unfair to charge the third party with the usual duty of care towards the private safety employee.[91]

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[90] 882 P.2d at 354 (emphasis added).

[91] *Id.* at 355.

Similarly, Hanson "lacks the relationship that justifies exonerating [it] from the usual duty of care." It did not provide or contract for Mr. Normandeau's services, nor did it pay "in any way to be relieved of [its] duty of care" toward Mr. Normandeau. Even if Mr. Normandeau were publicly compensated, as firefighters and police officers are, Hanson, as a foreign corporation not generally doing business in Utah (*see* R. 104, ¶¶ 7-12), would have contributed nothing towards that compensation. In short, Hanson was not a member of the public for whose benefit Mr. Normandeau allegedly was undertaking his services.

The California court also noted that another justification for the rule--namely, that it avoids "costly litigation over rights of subrogation without substantially benefiting the firefighter who is compensated either by the retirement system or the worker's compensation system"--does not apply to private plaintiffs: "Our concern to relieve various public agencies of the burden of lawsuits over rights of subrogation that are pointless because the public fisc ultimately pays regardless of the outcome, does not apply in the case of private safety employees."[92]

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[92] *Id.*

Another contrast between public employees and private ones, such as Mr. Normandeau, is that "the latter does not receive the special pay, disability and retirement benefits that a public safety officer receives."[93]

Finally, the court noted, the "substantial justifications for the firefighter's rule . . . based on the public nature of the service provided by firefighters and the relationship between the public and the public firefighter" simply do not apply to a private employee, such as Mr. Normandeau:

> Fire fighting is essentially a government function, and the public has undertaken the financial burden of providing it without liability to individuals who need it. Because of the relationship between the public, the firefighter, and those who require the services of the firefighter, the individual's usual duty of care towards the firefighter is replaced by the individual's contribution to tax-supported compensation for the firefighter. This relationship is missing between a privately employed safety employee and a third party.
>
> . . . ["]It is the public that hires, trains, and compensates fire fighters and police officers to confront danger. Basic to the public policy rationale underlying the fireman's rule is the spreading to the public of the costs of employing safety officers and of compensating them for any injuries they may sustain in the course of their employment. 'Fire fighters are present upon the premises [where they can be injured], not because of any private duty owed the occupant, but because of the duty owed to the public as a whole.'"[94]

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[93] *Id.*

[94] *Id.* at 357 (quoting *Kowalski v. Gratopp*, 442 N.W.2d 682, 683 (Mich. Ct. App. 1989)).

Thus, "[f]ire fighters and police officers are different than other employees whose occupations may peripherally involve hazards. Safety officers are employed, specially trained, and paid to confront dangerous situations for the protection of society."[95] Mr. Normandeau was not. He was not performing a government function that the public had undertaken the financial burden of providing without liability to those served but was doing a job for which those who benefited from his work would have to pay.

In short, "when a private safety employee seeks to recover against a third party for negligently inflicted injuries, the relationship between the parties and considerations of the public good that justify a relaxation of the general duty of care for public firefighters are simply lacking."[96] The court should therefore reject Hanson's invitation to absolve it of responsibility for its negligence, even if Hanson had properly preserved for appeal its argument that the so-called professional rescuer doctrine should apply in this case.

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95 *Id.* (quoting *Kowalski*, 442 N.W.2d at 684) (other citations omitted).

96 *Id.* at 356.

CONCLUSION

The trial court properly found that Hanson owed a duty of care to Mr. Normandeau under the facts of this case. There exists no good reason to relieve Hanson from liability for the harm its negligent repair of the Ryder truck caused. The court should therefore affirm the trial court's denial of Hanson's motion for summary judgment on the issue of duty.

DATED this day of 8th day of December, 2009.

DEWSNUP, KING & OLSEN

Paul M. Simmons

By: Paul M. Simmons
Attorneys for Plaintiffs and Respondents

(Original Signature)

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of December, 2009, I caused two true and correct copies of the foregoing to be served by U.S. mail, first-class postage prepaid, on:

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Paul M. Simmons

(Original Signature)

F \DATA\SRiley\Normandeau\Appeal\2d brief of appellees wpd

ADDENDUM

Utah Rule of Appellate Procedure 24(a)(9):

(a) *Brief of the appellant.* The brief of the appellant shall contain under appropriate headings and in the order indicated:

. . .

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

2009 UT 44

IN THE SUPREME COURT OF THE STATE OF UTAH

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Emily Normandeau, individually and as guardian for Alex Thayne, Jacob Thayn, and Hannah Normandeau, minors; and Lori Normandeau, as guardian for Daniel Normandeau and Melissa Normandeau, minors, on behalf of and for the benefit of the heirs of Dennis Normandeau, deceased.
Plaintiffs and Respondents,

v.

Hanson Equipment, Inc., a corporation; International Truck and Engine Corporation, a corporation; Bendix Commercial Vehicle Systems, LLC, a limited liability company; General Motors Corporation, a corporation, by and through its Allison Transmission Division; Budget Rent A Car System, Inc., a corporation fka Budget/Ryder TRS; Summit House Fine Furniture, L.L.C., a limited liability company; Dana Corporation, a corporation; and John Does 1-10,
Defendants and Petitioner.

No. 20071006

F I L E D

July 21, 2009

Third District, Salt Lake
The Honorable John Paul Kennedy
No. 020914093

Attorneys: Colin P. King, Paul M. Simmons, Tawni J. Anderson, Salt Lake City, for respondents
Melinda A. Morgan, Zachary E. Peterson, Salt Lake City, for petitioner

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On Certiorari to the Utah Court of Appeals

PARRISH, Justice:

INTRODUCTION

¶1 We granted certiorari on the question of whether the district court's denial of a pretrial motion for summary judgment is appealable after the trial has concluded and the jury has rendered its verdict and, if so, whether the party appealing the denial of the motion for summary judgement is required to reraise the basis for the motion during trial in order to preserve it for appeal. Regardless of whether the issue on which summary judgment was denied was reraised during trial, we hold that a party may appeal a denial of a motion for summary judgment so long as the basis for the motion was purely legal. We accordingly reverse the decision of the court of appeals.

FACTS & PROCEDURAL HISTORY

¶2 Mr. Normandeau, a tow truck driver, was killed as he prepared a Ryder rental truck for towing. A faulty repair to the truck's hydraulic hose caused torque to build up in the driveline. As a result, when Mr. Normandeau disconnected the driveline in preparation for towing, a portion of the rear differential broke loose and struck his head, killing him instantly. His heirs (the "Normandeaus") sued Hanson Equipment ("Hanson"), the company that had performed repairs to the hydraulic hose shortly before the accident.

¶3 Prior to trial, Hanson moved for summary judgment, claiming that it owed no duty to Mr. Normandeau as a matter of law and that its prior repair of the truck was not the proximate cause of Mr. Normandeau's death. At the summary judgment hearing, the Normandeaus argued that the question of duty could be decided as a matter of law, and neither Hanson nor the judge disputed this assertion. Hanson claimed that it was not foreseeable that the built up tension in the driveline would kill a potential tow truck driver. Because there was a question of fact about whether the faulty repair was a foreseeable cause of Mr. Normandeau's death, the district court denied summary judgment. Although the district court was not clear during the summary judgment hearing or in its subsequent written order about whether the foreseeability question went to both duty and proximate cause or just proximate cause, the parties apparently understood that any disputed factual issues went to the question of causation rather than duty.[1] At trial, the parties disputed

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[1] Indeed, our precedent is clear that the question of duty (continued...)

whether Hanson's repair to the truck was a proximate cause of Mr. Normandeau's injuries but did not raise the issue of whether Hanson owed Mr. Normandeau a duty. The jury found for the Normandeaus and assigned Hanson all of the liability.

¶4 Hanson appealed the district court's denial of their pretrial summary judgment motion on the issue of duty. The court of appeals held that it could not review the ruling because Hanson did not litigate the issue at trial and failed to make a rule 50(b) motion for directed verdict on the issue. Normandeau v. Hanson Equip. Inc., 2007 UT App 382, ¶¶ 13-14, 174 P.3d 1. The court of appeals explained that it could only review denials of pretrial summary judgment motions in cases where the litigant was foreclosed from raising at trial the basis for the motion. Id. (citing Wayment v. Howard, 2006 UT 56, ¶ 20, 144 P.3d 1147). We have jurisdiction to review the court of appeal's decision pursuant to Utah Code section 78A-3-102(3)(a) (2008).

ISSUES & STANDARD OF REVIEW

¶5 We granted certiorari to address two questions: (1) whether the court of appeals erred in its construction and application of the rules governing appellate consideration of challenges to denials of summary judgment on direct appeal following entry of final judgment and (2) whether the court of appeals erred in its assessment of the effect of Hanson's failure to explicitly raise the issue of duty of care at trial after denial of its motion for summary judgment on that issue.

¶6 "'On certiorari, we review the court of appeals' decision for correctness, focusing on whether that court correctly reviewed the trial court's decision under the appropriate standard of review.'" Pratt v. Nelson, 2007 UT 41, ¶ 12, 164 P.3d 366 (quoting Hansen v. Eyre, 2005 UT 29, ¶ 8, 116 P.3d 290).

ANALYSIS

I. THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT REVIEW THE DISTRICT COURT'S DENIAL OF HANSON'S PRETRIAL SUMMARY JUDGMENT MOTION

¶7 Appellate courts may review the denial of a pretrial summary judgment motion if the motion was decided on purely legal grounds. We previously have held that "[i]n appealing a summary

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(...continued)
is a purely legal issue. See discussion infra Part I.B.

judgment ruling, only facts and legal theories that were foreclosed from being addressed at trial may be heard on appeal." Wayment v. Howard, 2006 UT 56, ¶ 20, 144 P.3d 1147; see also Brown v. Jorgensen, 2006 UT App 168, ¶¶ 19-22, 136 P.3d 1252 (reviewing the pretrial denial of a summary judgment motion based on the court's decision not to strike a supporting affidavit, a legal issue that would be foreclosed from litigation at trial). However, our case law has been less than clear in defining when appellate review of denials of summary judgment motions is precluded. For example, we have sometimes reviewed the denial of a summary judgment motion when the issue raised was not subsequently litigated at trial, even though parties were not explicitly foreclosed from reraising the issue. See Prince, Yeates & Geldzahler v. Young, 2004 UT 26, ¶ 9, 94 P.3d 179 (considering after trial whether the district court erred in denying plaintiff's summary judgment motion on the basis that no contract existed as a matter of law). But we have also held that if a party has "the opportunity to fully litigate the issues raised in the summary judgment motions," we will not review the court's denial of those motions. Wayment, 2006 UT 56, ¶ 19.

¶8 Given the lack of clarity in our prior case law, we first examine what standard the court of appeals should have applied in determining whether to review the denial of Hanson's summary judgment motion. We then apply the standard to the issue of duty in this case.

A. Appellate Courts May Review Pretrial Denials of Summary Judgment Motions After Final Judgment Has Issued If the District Court Denied Summary Judgment on Purely Legal Grounds

¶9 On appeal, we will review a district court's denial of a summary judgment motion when the district court makes a legal ruling based on undisputed facts that do not materially change at trial. See Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Tel. & Tel. Co., 844 P.2d 322, 326 (Utah 1992). The district court must deny a motion for summary judgment if it finds that there is a genuine issue of material fact that bears on its legal determination or if it finds, as a matter of law based on the undisputed facts, that the moving party is not entitled to a legal ruling in its favor. See Utah R. Civ. P. 56(c). Because district courts are not required to specify the grounds on which they deny a motion for summary judgment, it may be difficult in some cases to ascertain whether the court denied a summary judgement motion based on the existence of a disputed material fact or as a result of a purely legal ruling.

¶10 This potential difficulty leads the Normandeaus to argue that this court should abandon our prior rulings allowing

us to review pretrial denials of summary judgment in favor of a bright line rule precluding all appellate review of such motions unless they are renewed at the conclusion of trial. Specifically, they argue that by allowing losing parties to appeal pretrial denials of summary judgment motions, appellate courts allow the summary judgment motion to become "a bomb planted within the litigation at its early stages and exploded on appeal." Holley v. Northrop Worldwide Aircraft Servs., Inc., 835 F.2d 1375, 1377 (11th Cir. 1988); see also Feiger, Collison & Killmer v. Jones, 926 P.2d 1244, 1249-50 (Colo. 1996).

¶11 Although some jurisdictions have chosen to implement this bright line rule, others recognize that "[a] critical distinction exists between 'summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide.'" Wilson v. Union Pac. R.R. Co., 56 F.3d 1226, 1229 (10th Cir. 1995) (quoting Ruyle v. Cont. Oil Co., 44 F.3d 837, 842 (10th Cir. 1994)). For example, in order to prevent parties from challenging summary judgment motions on appeal that were denied due to disputed material facts rather than on purely legal grounds, the Eleventh Circuit will not review the denial of a pretrial summary judgment motion if "(a) by trial the evidence produced by the opposing party was sufficient to be presented to the jury; or (b) by trial the evidence had been supplemented or changed in some manner favorable to the party who opposed summary judgment." Holley, 835 F.2d at 1377-78. This rule comports with our past appellate review of denied summary judgment motions.

¶12 In Estate Landscape, we reviewed a pretrial denial of a summary judgment motion when the pretrial judge made a legal ruling regarding accord and satisfaction that the trial judge declined to reconsider. 844 P.2d at 325. In that case, it would have been futile for the losing party to litigate accord and satisfaction at trial due to the earlier court ruling; no factual issue at trial would have affected the legal determination. Thus, we held that the denial of the earlier summary judgment motion, which had not thereafter been litigated at trial, was appealable. Id. at 325-26.

¶13 Similarly, in Prince, Yeates & Geldzahler we reversed a jury verdict based on an improper denial of summary judgment even though the legal issue decided by the court denying the motion was not specifically foreclosed from being litigated at trial. 2004 UT 26, ¶¶ 12-14. In that case, Prince Yeates sought summary judgment prior to the trial, arguing that under the undisputed material facts no contract existed between the parties as a matter of law. Id. ¶¶ 7-9. The district court denied the motion. Id. When the case went to the jury, the court

instructed them that the plaintiffs' oral agreement with Prince Yeates was a valid express contract. Prince Yeates did not object to this instruction. Brief of Appellee and Cross-Appellant at 37, Prince, Yeates & Geldzaher v. Young, 2004 UT 26, 94 P.3d 179 (No. 20020347). Although nothing in the denial of summary judgment suggested that Prince Yeats was foreclosed from litigating the existence of the contract at trial, we reviewed the pretrial legal ruling and reversed the jury verdict. Based on the undisputed facts presented in the summary judgment motion, which remained materially unchanged at trial, we held that the district court erred in determining that the vague oral agreement constituted an enforceable contract. Prince, Yeates & Geldzahler, 2004 UT 26, ¶ 14.

¶14 Purely legal issues are not decided by a trier of fact. Therefore, while we have stated that we review "only facts and legal theories that were foreclosed from being addressed at trial," Wayment, 2006 UT 56, ¶ 20, we do not require parties to reargue at trial legal issues that a trier of fact cannot decide. In both Estate Landscaping and Prince Yeates, the parties would not have benefitted from the opportunity to litigate the disputed legal issue at trial since both the existence of an accord and satisfaction and the existence of a contract in these cases were legal issues decided by the court. While the Prince Yeates litigants were not explicitly prevented from relitigating the existence of a contract, there would have been no benefit to doing so. Moreover, to allow review of pretrial denials of summary judgment only when a party is explicitly forbidden from reraising the legal issue at trial would preclude appellate consideration of nearly all pretrial denials of summary judgment motions because "reconsideration of an issue before a final judgment is within the sound discretion of the district court." IHC Health Servs. Inc. v. D & K Mgmt. Inc., 2008 UT 73, ¶ 27, 196 P.3d 588.

¶15 We therefore hold that when a court denies a motion for summary judgment on a purely legal basis, that is where the court denies the motion based on the undisputed facts, rather than because of the existence of a disputed material fact, the party denied summary judgment may challenge that denial on appeal. Any time "that reasonable minds could not differ as to the conclusion to draw from the evidence or that the evidence adduced was simply insufficient to sustain the legal claim, then the trial court should rule on the issue as a matter of law." AMS Salt Indus. Inc. v. Magnesium Corp. of Am., 942 P.2d 315, 320 (Utah 1997). On the other hand, when disputed facts bear on the decision or when new material facts emerge at trial that change the nature of the legal determination, parties then have an obligation to

reraise the issue at trial in order to preserve it for appeal. See Holley, 835 F.2d at 1377.

¶16 Because we hold that we may review a district court's denial of a summary judgment motion if the denial was based on a purely legal issue, we now analyze whether the district court's denial of Hanson's summary judgment motion is reviewable.

B. The District Court Made a Legal Ruling Based on Undisputed Facts When It Denied Hanson's Summary Judgment Motion on the Issue of Whether Hanson Owed Mr. Normandeau a Duty of Care

¶17 Because duty is a purely legal issue for the court to decide, the court of appeals erred when it determined that it could not review the pretrial denial of Hanson's summary judgment motion. The court of appeals held that it could not review the denial because duty of care is "heavily fact sensitive and is intertwined with the issue of foreseeability." Normandeau v. Hanson Equip., 2007 UT App 382, ¶ 14, 174 P.3d 1. The court of appeals reasoned that the issue of foreseeability bears on both duty and proximate cause, and thus the district court could not have ruled on duty as a matter of law. Id.

¶18 In contrast to the court of appeals' assertion that duty was submitted to the jury in the form of questions surrounding foreseeability, appellate courts have consistently held that "[t]he determination of whether a legal duty exists falls to the court." Yazd v. Woodside Homes Corp., 2006 UT 47, ¶ 14, 143 P.3d 283; see also Rose v. Provo City, 2003 UT App 77, ¶ 8, 67 P.3d 1017 ("[W]hether a duty of care is owed is 'entirely a question of law to be determined by the court.'" (quoting Lamarr v. Utah Dep't of Transp., 828 P.2d 535, 538 (Utah Ct. App. 1992))); AMS Salt Indus., 942 P.2d at 319 ("[T]he question of whether a duty exists is a question of law." (internal quotation marks omitted)). Moreover, during the summary judgment hearing, the Normandeaus agreed that duty would be "decided by the Court, as a matter of law" rather than by the jury. Consistent with the parties' understanding that a denial of summary judgment on the issue of duty was determined as a matter of law, the parties did not argue about duty at trial. Still, the Normandeaus argue that the question of whether Hanson owed a duty to the Normandeaus was dependent on whether the negligent repair caused Mr. Normandeau's death or whether he caused his own death by not checking for built up torque. Although this factual question does implicate the foreseeability of Mr. Normandeau's death, the specific mechanism of death is more properly an issue of proximate cause than one of duty.

¶19 "'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" AMS Salt Indus., 942 P.2d at 320-21 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53, at 356 (5th ed. 1984)). A court determines whether a duty exists by analyzing the legal relationship between the parties, the foreseeability of injury, the likelihood of injury, public policy as to which party can best bear the loss occasioned by the injury, and other general policy considerations. Id. at 321. "Legal duty, then, is the product of policy judgments applied to relationships." Yazd, 2006 UT 47, ¶ 17; see also Slisze v. Stanley-Bostitch, 1999 UT 20, ¶¶ 9-10, 979 P.2d 317 (finding that a manufacturer had no duty as a matter of law to inform a consumer that a safer alternative to its product existed); Ferree v. State, 784 P.2d 149, 151-52 (Utah 1989) (finding that corrections officers owe no duty of care to the general public because it would be contrary to the public policy of promoting rehabilitative programs).

¶20 Foreseeability as a factor in determining duty does not relate to the specifics of the alleged tortious conduct but rather to the general relationship between the alleged tortfeasor and the victim. "Whether a harm was foreseeable in the context of determining duty depends on the general foreseeability of such harm, not whether the specific mechanism of the harm could be foreseen." Lee v. Farmer's Rural Elec. Coop. Corp., 245 S.W.3d 209, 212 (Ky. Ct. App. 2007); see also Steffensen v. Smith's Mgmt. Corp., 862 P.2d 1342, 1346 (Utah 1993) ("What is necessary to meet the test of negligence . . . is that [the harm] be reasonably foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." (internal quotation marks omitted)).

¶21 At times, factual issues may bear on the issue of foreseeability as it relates to duty, but this is not such a case. The Normandeaus argue that the district court denied Hanson's motion for summary judgment on the issue of duty based on the extensive disputed material facts, relying on several Utah cases that have allowed the issue of foreseeability as it relates to duty to proceed to the jury. See Cruz v. Middlekauff Lincoln-Mercury, Inc., 909 P.2d 1252, 1255-56 (Utah 1996); Steffensen, 862 P.2d at 1346 (finding that jury instruction regarding foreseeability related primarily to proximate cause, though acknowledging that it could bear on negligence as well); Rees v. Albertson's, Inc. 587 P.2d 130, 133 (Utah 1978).[2] For instance,

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[2] In Rees, we stated that when there is a dispute about the (continued...)

when parties disputed whether "special circumstances" existed to find that the owner of a car who left the key in its ignition had a duty to a couple injured when the car was stolen, the court allowed the jury to evaluate the facts. Cruz, 909 P.2d at 1255-56. If there were such "special circumstances," then the car owner owed the injured party a duty. Id. at 1256. But in this case, there is no specific relationship test to be applied to determine whether Hanson owed Mr. Normandeau a duty. Rather, the court had the undisputed facts necessary to examine "'the legal relationships between the parties . . . [and analyze] the duties created by these relationships.'" Yazd, 2006 UT 47, ¶ 15 (quoting Loveland v. Orem City Corp., 746 P.2d 763, 766 (Utah 1987)).

¶22 In this case, the parties did not dispute that Hanson repaired the moving truck's hydraulic line, that the hydraulic line failed, that Mr. Normandeau was called to tow the truck, and that he was then killed when the driveline hit him in the head. By denying summary judgment, the district court implicitly found that Hanson had a duty to avoid creating a hazardous situation for a tow truck driver. The intertwined questions of fact did not go to the question of whether Hanson owed a duty to Mr. Normandeau, but rather to whether the repair to the driveline was the proximate cause of his death. Thus, like the losing parties in Estate Landscaping and Prince Yeates, Hanson would not have benefitted from reraising the issue of duty at trial. The jury could not decide the issue as the court had already made a purely legal determination based on the undisputed material facts. And no new evidence was offered at trial to undermine the basis for the court's initial determination.

II. ONCE A PARTY HAS PROPERLY PRESERVED A PURELY LEGAL ISSUE THROUGH A PRETRIAL MOTION FOR SUMMARY JUDGMENT, IT IS NOT REQUIRED TO RERAISE THAT ISSUE AT TRIAL IN ORDER TO PRESERVE IT FOR APPELLATE REVIEW

¶23 Because the district court ruled on summary judgment that Hanson owed Mr. Normandeau a duty of care, Hanson was not

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(...continued)
foreseeability of an injury occurring, "the questions relating to negligence and proximate cause are generally for the fact-trier, court or jury, to determine." Rees, 587 P.2d at 133. But the foreseeability discussed in Rees--whether Albertson's could have reasonably foreseen that breaching its duty not to sell beer to minors--related to whether Albertson's was the proximate cause of the resulting accident not, as contested by the Normandeaus, whether Albertson's had a duty not to sell the beer.

required to reraise the duty issue in a motion for directed verdict in order to preserve its appellate rights. "[I]n order to preserve an issue for appeal the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968 (citing Badger v. Brooklyn Canal Co., 966 P.2d 844, 847 (Utah 1998)). An issue is preserved if it is raised in a timely fashion, clearly identified, and adequately briefed. Id. "[O]nce trial counsel has raised an issue before the trial court, and the trial court has considered the issue, the issue is preserved for appeal." Id. We impose no specific requirement that "a party . . . file a post-judgment motion before the trial court as a prerequisite to filing an appeal." Sittner v. Schriever, 2000 UT 45, ¶ 16, 2 P.3d 442 (reviewing grant of partial summary judgment even though it was not raised in a postjudgment motion).

¶24 The Normandeaus argue that we should require parties to reraise legal issues decided on summary judgment to give the court a chance to reconsider them in light of the facts presented and decided at trial. It is true that "the interlocutory nature of a partial summary judgment leaves [determinations made in such motions] subject to modification by the trial court up until the entry of final judgment." Wayment v. Howard, 2006 UT 56, ¶ 20, 144 P.3d 1147. But raising a legal issue during a summary judgment motion based on the undisputed facts properly provides the court with an opportunity to rule on the issue. And once the district court has an opportunity to consider the legal issue, as is the case when the motion for summary judgment is denied based on the undisputed facts that do not materially change at the subsequent trial, we will not require parties to reraise the same issue in order to preserve it for appeal. We therefore hold that by moving for summary judgment on the issue of duty, Hanson properly preserved that issue for appeal.

CONCLUSION

¶25 The court of appeals erred in determining that it lacked jurisdiction to consider Hanson's appeal of the district court's denial of its summary judgment motion on the issue of duty. Hanson was not required to reraise the duty issue at the close of trial in order to preserve its right to appeal the district court's decision. We therefore reverse the decision of the court of appeals and remand this matter to the court of appeals to consider whether the district court properly ruled that Hanson owed Mr. Normandeau a duty of care.

¶26 Chief Justice Durham, Associate Chief Justice Durrant, Justice Wilkins, and Justice Nehring concur in Justice Parrish s opinion.

IN THE UTAH COURT OF APPEALS

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Emily Normandeau, individually and as guardian for Alex Thayn, Jacob Thayn, and Hannah Normandeau, minors; and Lori Normandeau, as guardian for Daniel Normandeau and Melissa Normandeau, minors, on behalf of and for the benefit of the heirs of Dennis Normandeau, deceased, Plaintiffs and Appellees, v. Hanson Equipment, Inc., Defendant and Appellant.	OPINION (For Official Publication) Case No. 20060723-CA F I L E D (November 29, 2007) 2007 UT App 382

Third District, Salt Lake Department, 020914093
The Honorable John Paul Kennedy

Attorneys: Melinda A. Morgan and Zachary E. Peterson, Salt Lake City, for Appellant
Colin P. King, Paul M. Simmons, and Tawni J. Sherman, Salt Lake City, for Appellees

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Before Judges Billings, Davis, and Orme.

BILLINGS, Judge:

¶1 Defendant Hanson Equipment, Inc. (Hanson) appeals the jury verdict in favor of Plaintiffs Emily Normandeau, individually and as guardian for Alex Thayn, Jacob Thayn, and Hannah Normandeau, minors; and Lori Normandeau, as guardian for Daniel Normandeau and Melissa Normandeau, minors, on behalf of and for the benefit of the heirs of Dennis Normandeau (Plaintiffs). We affirm.

BACKGROUND

¶2 In early 2001, Dennis Normandeau started working as a mechanic for Kenworth Sales Company, a diesel maintenance and repair shop and towing service. In May or June 2001, Normandeau's duties were increased to include working as the primary wrecking driver. Normandeau's supervisor at Kenworth trained Normandeau for his new responsibility and taught him how to use a large diesel wrecker.

¶3 On November 10, 2001, Normandeau responded to a call for roadside assistance after a Ryder rental truck broke down in Spanish Fork Canyon, Utah County, Utah. The truck had a spring-applied, hydraulically-released parking brake system. The parking or emergency brake was on the driveline behind the transmission and ran off the power steering unit. The truck broke down because it had a leak in the power steering line, which caused the parking brake to engage, preventing the driveline from turning and causing torque to build up in the driveline.

¶4 To tow the truck, Normandeau had to disconnect the driveline from the transmission. As Normandeau was disconnecting the driveline, the built-up torque released violently, causing the differential yoke to break off. Either the differential yoke or the driveshaft hit Normandeau in the head, killing him instantly.

¶5 Plaintiffs brought a wrongful death action, alleging that Hanson had earlier repaired the truck negligently, which caused it to break down. Plaintiffs' lawsuit also included International Truck & Engine Corporation (ITEC), which was the designer of the truck's hydraulic system, as well as other companies associated with the design, manufacture, and lease of the truck. All of the defendants except Hanson were dismissed before trial.

¶6 Prior to trial, Hanson filed a motion for summary judgment on the grounds that Hanson owed no duty of care to Normandeau, that Hanson's repair was not the proximate cause of Normandeau's death, and that Normandeau was negligent in preparing the truck for towing. The trial court denied Hanson's motion for summary judgment, and the case went to trial. The jury returned a verdict in favor of Plaintiffs. Hanson then filed a motion for a new trial or, in the alternative, for a remittitur. The trial court denied that motion, and Hanson now appeals.

ISSUES AND STANDARDS OF REVIEW

¶7 On appeal, Hanson first asserts that the trial court erred when it denied Hanson's motion for summary judgment. Because the issues presented to the trial court for summary judgment were also presented to the jury at trial, we do not consider this argument on the merits.

¶8 Second, Hanson claims that the trial court erred when it failed to instruct the jury regarding ITEC's negligent design of the truck's hydraulic system, which caused the parking brake to engage and resulted in the presence of torque in the driveline. "We review challenges to jury instructions under a correctness standard." Child v. Gonda, 972 P.2d 425, 429 (Utah 1998).

¶9 Third, Hanson asserts that the trial court abused its discretion when it failed to strike Normandeau's untimely designation of an expert witness who highlighted material issues of fact in opposing Hanson's motion for summary judgment. Hanson further argues that this error was compounded when the trial court granted Plaintiffs' motion in limine to preclude Normandeau's supervisor and co-worker from testifying at trial. "Trial courts have broad discretion in managing the cases before them . . . ." A.K. & R. Whipple Plumbing & Heating v. Aspen Constr., 1999 UT App 87, ¶ 11, 977 P.2d 518. Therefore, we review whether a trial court properly ruled on pretrial compliance with a scheduling order under an abuse of discretion standard. See id. We also review the trial court's grant of Plaintiffs' motion in limine under an abuse of discretion standard. See Walker v. Hansen, 2003 UT App 237, ¶ 12, 74 P.3d 635.

¶10 Fourth, Hanson argues that Normandeau's counsel made improper closing arguments at trial and that these improper arguments warrant a new trial. "[T]he grant of a new trial is ordinarily left to the sound discretion of the trial court[; therefore,] we . . . review the court's decision in this regard under an abuse of discretion standard." Child, 972 P.2d at 429.

ANALYSIS

I. Summary Judgment

¶11 Hanson first argues that the trial court erred when it denied Hanson's motion for summary judgment. However, before we reach the merits of this argument, we must decide, as a threshold matter, whether we should entertain an appeal of the trial court's denial of summary judgment after the case was subsequently resolved by a trial on the merits.

¶12 Generally, "[a] denial of a motion for summary judgment is not a final determination on the merits and, therefore, is not an appealable interlocutory order." Feiger, Collision & Killmer v. Jones, 926 P.2d 1244, 1247 (Colo. 1996); see also Heuser v. Schmittroth, 2002 UT App 42U (mem.) (per curiam) ("The denial of a summary judgment motion is not final and appealable because it leaves the case pending. Upon denial of [a] summary judgment motion, [the losing party] ha[s] the burden to either try the case or dismiss it."); Manuel v. Fort Collins Newspapers, Inc., 631 P.2d 1114, 1116 (Colo. 1981) (noting that in "most . . . jurisdictions[,] the denial of a motion for summary judgment is not a final order which may be appealed but is, rather, an unappealable interlocutory ruling"). Some jurisdictions, including Utah, will allow a denial of a motion for summary judgment to be appealed, but only after the final judgment is entered in the case. See Manuel, 631 P.2d at 1116; see, e.g., Malibu Inv. Co. v. Sparks, 2000 UT 30, 996 P.2d 1043 (reviewing the trial court's denial of a motion for summary judgment). However, "[i]n a substantial number of jurisdictions, . . . reviewability is denied even after final judgment, particularly where the case has gone to trial subsequent to the denial of the summary judgment motion." Manuel, 631 P.2d at 1116.[1] A few

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1. See also Lama v. Borras, 16 F.3d 473, 476 n.5 (1st Cir. 1994); Black v. J.I. Case Co., 22 F.3d 568, 570-72 (5th Cir. 1994); Watson v. Amedco Steel, Inc., 29 F.3d 274, 276-78 (7th Cir. 1994); Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 434 (8th Cir. 1994); Jarrett v. Epperly, 896 F.2d 1013, 1016 (6th Cir. 1990); Holley v. Northrop Worldwide Aircraft Servs., 835 F.2d 1375, 1377-78 (11th Cir. 1988); Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1358-59 (9th Cir. 1987); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1573-74 (Fed. Cir. 1986); Senza-Gel Corp. v. Seiffhart, 803 F.2d 661, 669 (Fed Cir. 1986); Feiger, Collision & Killmer v. Jones, 926 P.2d 1244, 1247 (Colo. 1996); Phillips v. Abel, 233 S.E.2d 384 (Ga. Ct. App. 1977) (holding a motion for summary judgment is moot after the evidence has been reviewed in a trial on the merits); Evans v. Jensen, 655 P.2d 454, 459 (Idaho Ct. App. 1982) (explaining that a final judgment after trial should be tested upon the record made at trial not at the time summary judgment was denied); Kiesau v. Bantz, 686 N.W.2d 164, 174 (Iowa 2004) (holding that after a full trial on the merits the denial of summary judgment merges with the trial); Skowronski v. Sachs, 818 N.E.2d 635, 638 n.5 (Mass. App. Ct. 2004) (stating that no right to review exists when case has proceeded to trial on the merits, unless the summary judgment issue was on a different claim than was tried); Cannon v. Day, 598 S.E.2d 207, 210 (N.C. Ct. App. 2004) ("Improper denial of a motion for summary judgment is not

(continued...)

jurisdictions provide an exception to this principle and will allow appellate review of a denial of summary judgment even after a trial on the merits, but only if the motion for summary judgment was based on a purely legal question.[2]

¶13 Utah case law suggests that we will entertain an appeal of a denial of a motion for summary judgment only if it involves a legal issue. In Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co., 844 P.2d 322 (Utah 1992), the Utah Supreme Court reviewed a denial of summary judgment after a trial on the merits because the trial court "was dealing with undisputed facts, [and its] denial of summary judgment amounted to a ruling of law." Id. at 326. But in Wayment v. Howard, 2006 UT 56, 144 P.3d 1147, the Utah Supreme Court declined to review a denial of partial motions for summary judgment because "[a]t trial, [the moving party] had the opportunity to fully litigate the issues raised in the summary judgment motions." Id. ¶ 19. Specifically, the moving party "was allowed to present his evidence and argument on the issues." Id. The supreme court reasoned that "[i]n appealing a summary judgment ruling, only facts and legal theories that were foreclosed from being addressed at trial may be heard on appeal." Id. ¶ 20. Thus, our case law suggests that only the legal issues decided by the denial of summary judgment that prevented a party from dealing with the issue at trial will be considered after a trial on the merits.

¶14 We conclude that the denial of the motion for summary judgment is not appealable under prior Utah case law and the facts of this case. The issue of proximate cause and negligence were presented to the jury and decided against Hanson.

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1. (...continued)
reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts . . . ." (internal quotation marks omitted)). But see Ondrusek v. Murphy, 120 P.3d 1053, 1055-56 & n.2 (Alaska 2005) (reviewing a summary judgment denial, but noting that although the Alaska Supreme Court "has reviewed summary judgment denials" in the past, it would "give serious consideration in the future to adoption of what seems to be the majority view concerning reviewability of summary judgment denials").

2. See, e.g., Wiles v. Michelin N. Am., Inc., 173 F.3d 1297, 1301 (10th Cir. 1999); Wolfgang v. Mid-America Motorsports, Inc., 111 F.3d 1515, 1521 (10th Cir. 1997); Regency Commercial Assocs. v. Lopax, Inc., 869 N.E.2d 310, 320 (Ill. App. Ct. 2007); Gallegos v. New Mexico Bd. of Educ., 1997-NMCA-40, ¶ 8, 123 N.M. 362, 940 P.2d 468.

Certainly, the trial court did not err in declining to rule as a matter of law that Hanson's negligence was not a proximate cause of Normandeau's death. The issue of duty, though technically an issue of law, is heavily fact-sensitive and is intertwined with the issue of forseeability, which was also presented to the jury and decided against Hanson. Indeed, Hanson "was accorded the opportunity to fully litigate [its] case." See id. Finally, and most importantly, there was nothing preventing Hanson from making a motion to dismiss at trial on the issue of duty, thus preserving this issue for appeal. "Consequently, the trial court's . . . denial[] of . . . summary judgment resulted in no prejudice[and] did not affect the final outcome . . . ." Id. Therefore, we do not review the denial of Hanson's motion for summary judgment.

II. Jury Instructions

¶15 Hanson next argues that the trial court erred by refusing to give its requested jury instruction regarding ITEC's negligent design of the truck's hydraulic system. Hanson requested that the jury be instructed on negligent design law and that ITEC be listed on the special verdict form as a possible negligent party and intervening cause. Hanson submitted Model Utah Jury Instruction (MUJI) 12.16, which provides: "The manufacturer of a product that is reasonably certain to be dangerous if negligently made has a duty to exercise reasonable care in the design of the product, so that the product may be safely used in a manner and for a purpose for which it was made." However, the trial court did not include MUJI 12.16 with the other jury instructions.

¶16 We review a challenged jury instruction in context with all other jury instructions provided to the jury. See Jensen v. Intermountain Power Agency, 1999 UT 10, ¶ 16, 977 P.2d 474. "'As we have repeatedly held, if the jury instructions as a whole fairly instruct the jury on the applicable law, reversible error does not arise merely because one jury instruction, standing alone, is not as accurate as it might have been.'" Id. (quoting Bott v. DeLand, 922 P.2d 732, 741 (Utah 1996)) (citation omitted). A party is entitled to have the jury instructed on its theory of the case if competent evidence is presented at trial to support its theory. See Van Erickson v. Sorenson, 877 P.2d 144, 151 (Utah Ct. App. 1994). However, it is not entitled to have the jury instructed with any particular wording. See id. As long as the instructions, read as a whole, fairly instruct the jury on applicable law, it is not error to refuse a particular instruction. See id. ("'[I]t is not error [for the trial court] to refuse a proposed instruction if the point is properly covered in the other instructions.'" (quoting State v. Sessions, 645 P.2d 643, 647 (Utah 1982))).

¶17 Although MUJI 12.16 was not included in the set of instructions given to the jury, the trial court provided sufficient jury instructions regarding Hanson's claim that ITEC was negligent. For example, in jury instruction 19, the trial court told the jury that Hanson "claim[ed] that other persons are responsible for . . . Normandeau's death, including [ITEC] (the manufacturer of the Ryder truck)" and that Hanson "claim[ed] that the negligence of these others was the cause of . . . Normandeau's death."

¶18 Further, jury instruction 22 read:

> Although [ITEC] and Plaintiffs reached a resolution of the issues between them in this case, [ITEC] still remains as a Defendant in this action. Thus, it will be your duty to assess and allocate fault in this matter, whether that allocation be against . . . Normandeau and/or Hanson . . . and/or against [ITEC] . . . .

And, jury instruction 23 told the jury that "[u]nless otherwise stated, all instructions given [to] you govern the case as to each Defendant. The mere fact that an accident or injury occurred does not support the conclusion that any party was [at] fault or negligent."

¶19 The trial court went on to define negligence and comparative negligence without limiting those instructions to Hanson or Normandeau, and without excluding ITEC. Jury instruction 38, on comparative negligence, stated in part:

> If you decide that more than one person was responsible for . . . Normandeau's death, you must decide each person's percentage of fault. "Fault" means a breach of legal duty and includes negligence. This allocation of fault must be done on a percentage basis, and the total must be 100%. Each person's percentage should be based on how much that person's fault contributed to . . . Normandeau's death.

¶20 Finally, in jury instruction 45, the court told the jury:

> Hanson . . . and [ITEC] are corporations and, as such, can act only through their officers and employees, and others designated by it as its agents.

> Any act or omission of an officer, employee, or agent of a corporation, in the performance of their [sic] duties or within the scope of the authority of the officer, employees or agent, is the act or omission of the corporation. So, if you find that the preponderance of the evidence shows that an officer, agent, or employee of a particular corporation was negligent in performing his duties or within the scope of this authority, then you must find that particular corporation was negligent.

¶21 These instructions, when read in context with the trial court's other jury instructions, adequately informed the jury that it could find that ITEC was at fault in causing Normandeau's death if ITEC had acted negligently. Counsel for Hanson argued to the jury that ITEC was negligent, and the jury rejected those arguments. In answer to the specific question, "Was any fault on the part of [ITEC] a cause of the death of . . . Normandeau?" the jury answered, "No." Therefore, we conclude that the trial court did not err in failing to include MUJI 12.16 in the set of instructions provided to the jury because the other instructions, taken as a whole, adequately instructed the jury regarding ITEC's alleged negligence.

¶22 Hanson further argues that ITEC should have been listed as a potentially negligent party on the special verdict form. However, ITEC was listed as a potentially responsible party on the special verdict form. Specifically, the special verdict form asked the jury, "Was the Defendant [ITEC] strictly liable under the facts of this case?" and "Was any fault on the part of [ITEC] a cause of the death of . . ., Normandeau?" The jury answered "No" to each of these questions. We acknowledge that ITEC was listed as a party under a theory of strict liability, and not specifically as a party under a theory of negligence. However, because ITEC was included as a party on the special verdict form and because the jury was asked the general question of whether ITEC was the cause of Normandeau's death and the jury answered "No," *we conclude that any error in not listing ITEC as a* potentially negligent party was harmless.

III. Untimely Designation of Expert Witnesses and Plaintiffs' Motion in Limine

¶23 Hanson also argues that the trial court abused its discretion in failing to strike Plaintiffs' untimely designation of their towing expert, Jesse A. Enriquez, and that the trial court erred when it granted Plaintiffs' motion in limine, which sought to limit the opinion testimony of Normandeau's supervisor

and co-worker. We conclude that both of these rulings were within the trial court's discretion.

¶24 First, under the original scheduling order, the parties were to exchange rebuttal expert witnesses by March 11, 2005. The trial court later entered a new scheduling order that gave Hanson until May 31, 2005, to designate its experts. The revised schedule did not contain any date for rebuttal expert designations, and Hanson did not designate any experts before it moved for summary judgment. Plaintiffs claim that Enriquez was a rebuttal expert who was used to respond to Hanson's motion for summary judgment. Upon receiving Enriquez's affidavit, served in conjunction with Plaintiff's opposition to Hanson's motion for summary judgment, Hanson moved to strike the affidavit on the grounds that Enriquez was not timely designated as an expert. After a hearing on the motion, the trial court denied Hanson's motion and allowed Plaintiffs to designate Enriquez. It also allowed Hanson to depose Enriquez and to designate its own towing expert. Hanson then hired LaMar McQuaid, a towing expert, who testified at trial on behalf of Hanson.

¶25 We conclude that the trial court was within its discretion to allow Plaintiffs to designate Enriquez as a towing expert and to allow his testimony as a response to Hanson's motion for summary judgment. "A trial court has necessary discretion in managing cases by pretrial scheduling and management conferences." DeBry v. Cascade Enters., 879 P.2d 1353, 1361 (Utah 1994); see also Utah R. Civ. P. 16 ("[T]he court, upon its own motion or upon the motion of a party, may conduct a scheduling and management conference."). "Because the trial judge deals primarily with the parties and the discovery process, he or she has great latitude in determining the most efficient and fair manner to conduct the court's business." A.K. & R. Whipple Plumbing & Heating v. Aspen Constr., 1999 UT App 87, ¶ 36, 977 P.2d 518. This includes "discretion in determining whether a violation of a scheduling order warrants sanction," id., such as striking Enriquez's expert affidavit, see Utah Dep't of Transp. v. Osguthorpe, 892 P.2d 4, 6 (Utah 1995) (recognizing that "[t]he striking of pleadings . . . [is one of] the most severe of the potential sanctions that can be imposed upon a . . . party").

¶26 Assuming, without deciding, that Plaintiffs' designation of Enriquez as an expert was untimely and that Plaintiffs therefore violated the scheduling order, Hanson was not prejudiced by any such untimely designation because the trial court gave Hanson an opportunity to depose Enriquez and to designate its own towing expert. See, e.g., A.K. & R. Whipple Plumbing, 1999 UT App 87, ¶ 37. Moreover, the designation of the towing experts came well in advance of trial. Therefore, the trial court did not err in

allowing Plaintiffs' designation of Enriquez as a towing expert. See id.

¶27 Hanson further argues that the trial court erred when it granted Plaintiffs' motion in limine, which sought to limit the opinion testimony of Normandeau's supervisor and co-worker. However, Hanson failed to provide an adequate record to enable this court to review the trial court's ruling. In their motion in limine, Plaintiffs argued that the trial court should preclude Normandeau's supervisor and co-worker from expressing opinions about the cause of and the responsibility for Normandeau's accident. Plaintiffs asserted that Normandeau's supervisor and co-worker were lay witnesses whose opinions were based on personal perception, lacked foundation, required speculation, stated legal conclusions, invaded the province of the jury, and would not assist the trier of fact. Hanson responded by arguing that Normandeau's supervisor and co-worker provided expert testimony and that Plaintiffs are not prejudiced by these individuals providing such expert testimony.

¶28 On January 30, 2006, a hearing was held concerning Plaintiffs' motion in limine. However, the record before us provides no transcript of that hearing. Instead, we are only provided with the minutes, which state that a motion in limine was argued and that "[t]he [c]ourt rule[d] as stated on the record." This statement does not provide us with the facts the trial court considered in making its ruling, the trial court's basis for granting Plaintiffs' motion in limine, or the trial court's findings and legal conclusions. The only information concerning Plaintiffs' motion in limine that the record provides is that the trial court did, in fact, grant Plaintiff's motion.

¶29 If a party fails to provide an adequate record, we will assume the regularity of the proceedings below. See State v. Miller, 718 P.2d 403, 405 (Utah 1986) (per curiam). Moreover, we note that "'a trial judge is accorded broad discretion in determining how a trial shall proceed in his or her courtroom.'" Tschaggeny v. Milbank Ins. Co., 2007 UT 37, ¶ 16, 163 P.3d 615 (quoting University of Utah v. Industrial Comm'n, 736 P.2d 630, 633 (Utah 1987)). As such, we conclude that the trial court was within its discretion when it granted Plaintiffs' motion in limine regarding the testimony of Normandeau's supervisor and co-worker. See id. (holding that "a trial court is free . . . to alter a previous in limine ruling, . . . [and to] exercise its discretion to disregard motions to reconsider prior in limine rulings" (internal quotation marks omitted)).

IV. Improper Closing Argument

¶30 Finally, Hanson argues that the trial court erred when it denied Hanson's motion for a new trial because of allegedly improper and prejudicial remarks Plaintiffs' counsel made in his closing arguments. However, Hanson did not timely object to these statements at trial. "Absent an objection by [a] defendant, we will presume waiver of all arguments regarding the appropriateness of counsel's statements unless the error falls into the category of plain error." Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992). Hanson does not argue plain error, nor do we find any plain error regarding Plaintiffs' counsel's closing argument. Therefore, we do not address Hanson's argument that Plaintiffs' attorney made improper statements during closing argument.

CONCLUSION

¶31 Regarding Hanson's argument that the trial court erred in denying its summary judgment motion, we conclude that such a denial is not appealable under the facts of this case. Therefore, we do not address it. We further conclude that the trial court's jury instructions were proper and adequately informed the jury of the law concerning Hanson's defense. Moreover, we conclude that the trial court did not abuse its discretion when it allowed the designation of Plaintiffs' expert and granted Plaintiffs' motion in limine. Finally, we do not address Hanson's claim that Plaintiffs' counsel's closing arguments were improper because Hanson failed to object to them at trial.

¶32 Accordingly, we affirm.

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Judith M. Billings, Judge

¶33 I CONCUR:

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James Z. Davis, Judge

ORME, Judge (concurring in part and dissenting in part):

¶34 I concur in the balance of the opinion, but I disagree with my colleagues that there is appellate jurisdiction over only some denials of summary judgment. I believe that once a final judgment has been entered, we have jurisdiction over appeals questioning the denial of a motion for summary judgment regardless of the basis for the denial, although I recognize that such appeals will ordinarily be for naught as a practical matter.

¶35 Whatever may be the rule in other jurisdictions, Utah recognizes that when a party complies with rule 3(d) of the Utah Rules of Appellate Procedure, and designates the final judgment in its notice of appeal, it is "not precluded from alleging errors in any intermediate order involving the merits or necessarily affecting the judgment as long as such errors were properly preserved."[1] Zion's First Nat'l Bank v. Rocky Mountain Irrigation, Inc., 931 P.2d 142, 144 (Utah 1997). On the contrary, "[w]hen an appellant files a notice of appeal from a final judgment, he may, in his opening brief, challenge all nonfinal prior orders and happenings which led up to that final judgment." Id. (citation and internal quotation marks omitted). Professors Wright and Miller specifically recognize that this familiar precept applies to denials of summary judgment. See 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure: Civil § 2715, at 264-66 (3d ed. 1998)

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1. I readily agree with the majority that a denial of summary judgment, an intermediate order, is not immediately appealable as a matter of right. See Wayment v. Howard, 2006 UT 56, ¶ 20 & n.13, 144 P.3d 1147. While a party may petition to have the denial considered on interlocutory appeal, it is not required to do so. See generally Utah R. App. P. 5(a). Utah has a long history of discouraging piecemeal appeals and favoring a single appeal from a single action, see, e.g., Anderson v. Wilshire Invs., LLC, 2005 UT 59, ¶ 9, 123 P.3d 393; Miller v. USAA Cas. Ins. Co., 2002 UT 6, ¶ 68, 44 P.3d 663; Kennedy v. New Era Indus., Inc., 600 P.2d 534, 535 (Utah 1979); O'Gara v. Findlay, 7 Utah 2d 218, 321 P.2d 953, 953-54 (1958), and only rarely will an interlocutory appeal be granted from the denial of a summary judgment motion. When leave is not sought or when it is sought but denied, the question of whether the intermediate order was erroneous does not vaporize but is simply pushed forward for possible consideration after the entry of final judgment. Adherence to this precept both serves the policy in favor of one appeal per case and assures litigants there is no need to seek appeal of every intermediate disposition along the way, as their right to fuss about such dispositions will be fully preserved for appeal following the entry of final judgment.

("[After] entry of judgment following the trial on the merits, . . . the party who unsuccessfully sought summary judgment may argue that the trial court's denial of the Rule 56 motion was erroneous.") (footnotes omitted).[2]

¶36 What I have said goes only to jurisdiction--to the power of an appellate court to consider all interlocutory orders on appeal from a final judgment, including interlocutory orders denying summary judgment motions. I do not mean to suggest that such challenges are likely to be successful. Indeed, as a practical matter, it will be hard for a party to argue entitlement to judgment as a matter of law when judge or jury, having heard all the evidence and seen live witnesses, actually awarded judgment to the other side. In such a case, the appealing party is fighting an impossible battle in the absence of a mistake of law impacting the judgment entered. Even in the case where denial of a summary judgment motion turns exclusively on a legal issue, it will ordinarily be more efficient to reassert that legal issue in the context of a motion to dismiss at the close of the plaintiff's case, a motion for directed verdict, a challenge to the trial court's instructions to the jury, etc.--and to seek

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2. The majority relies upon Wayment v. Howard, 2006 UT 56, 144 P.3d 1147, in concluding that in Utah "only the legal issues decided by the denial of summary judgment that prevented a party from dealing with the issue at trial will be considered after a trial on the merits." Lead Opinion ¶ 13. In Wayment, the Utah Supreme Court held that "only facts and legal theories that were foreclosed [by a summary judgment ruling] from being addressed at trial may be heard on appeal," 2006 UT 56, ¶ 20 (emphasis in original), but it cited no authority in support of that pronouncement, it did not characterize the limitation as jurisdictional, and it did not cross-reference the general rule set forth in Zion's First National Bank v. Rocky Mountain Irrigation, Inc., 931 P.2d 142 (Utah 1997), which I quote in ¶ 35 of this opinion. Thus, it seems entirely possible that the Court had in mind the same kind of practical inefficacy of such a challenge on appeal that I readily recognize, rather than a true jurisdictional bar.

The majority also relies upon Estate Landscape & Snow Removal Specialists, Inc. v. Mountain States Telephone & Telegraph Co., 844 P.2d 322 (Utah 1992), where the Supreme Court did review a denial of summary judgment, see id. at 325-31, but such reliance is misplaced. The Supreme Court's only relevant references were with respect to its determination of the appropriate standards of review. See id. at 326 ("Because he was dealing with undisputed facts, [the trial judge]'s denial of summary judgment amounted to a ruling of law, which we review for correctness[.]").

appellate consideration of the trial court's pertinent rulings--than to overtly challenge the trial court's earlier denial of summary judgment. But such barriers to success on appeal from a denial of summary judgment are practical, not jurisdictional. Accordingly, I believe that Hanson was free to raise its challenge to the trial court's denial of its motion for summary judgment and that we are obliged to consider that challenge on its merits, such as they are.

¶37 On the merits, I cannot say that the trial court erred in denying Hanson's summary judgment motion. Hanson's moving papers failed to establish, as a matter of law, that Hanson owed no duty of care to Normandeau, that Hanson's repair did not proximately cause Normandeau's death, or that Normandeau was negligent in preparing the truck for towing. Accordingly, the trial court ruled correctly in denying the motion.

_____

Gregory K. Orme, Judge

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NOTICE THIS IS AN UNPUBLISHED OPINION

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter Use FI CTAF Rule 47 6 for rules regarding the citation of unpublished opinions)

United States Court of Appeals, Federal Circuit
PRINCETON BIOCHEMICALS, INC ,
Plaintiff-Appellant,
v
BECKMAN INSTRUMENTS, INC ,
Defendant-Appellee
No. 98-1525.

Aug 19, 1999

Before CLEVENGER, RADER, and GAJARSA, Circuit Judges

DECISION

GAJARSA

*1 Princeton Biochemicals, Inc ("Princeton") appeals the decision of the United States District Court for the District of New Jersey, No 96-CV-5541, granting Beckman Instruments, Inc 's ("Beckman's") motion for summary judgment of noninfringement of claim 32 of Princeton's U S Patent No 5,045,172 Because the district court incorrectly construed that claim, we *vacate* the grant of summary judgment, and *remand* the case to determine literal infringement in light of the correct claim construction

BACKGROUND

Princeton is the owner of U S Patent No 5,045,172 ("the '172 patent") entitled Capillary Electrophoresis Apparatus The '172 patent is directed to an apparatus for use in the process of capillary electrophoresis whereby molecules and proteins are separated from fluid samples as a result of application of an electrical charge Capillary electrophoresis technology itself is not at issue on appeal Rather, part of the apparatus used in that process is, namely, the "holder" limitation of claim 32 (emphasized below in element [6])

32 Capillary electrophoresis apparatus comprising

[1] a capillary tube of the type which can be electrically charged,

[2] said capillary tube having first and second ends,

[3] first means at said first end of said capillary tube providing a source of buffer solution and a source of a sample substance to be analyzed,

[4] second means coupled to said apparatus for applying electrical potential across said capillary tube whereby a sample flows through said capillary tube and past said detector,

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[5] said first means includes a rotatable table carrying a plurality of sample cups and

[6] *a holder for holding an end of said capillary tube in operative relation with one of the said cups,* said cups containing either buffer solution or a sample to be analyzed,

[7] said capillary tube is in the form of a coil of glass tubing

[8] wherein said coil of glass tubing is secured to a support member.

(paragraphing added for clarity). In the claimed apparatus, fluid samples to be tested (or buffer solutions) are contained in sample cups, which in turn are placed on a rotating table to facilitate ease of multiple sample testing. Each individual sample flows through a coiled, glass capillary tube secured to a support member, the capillary tube being held by the holder of element [6] "in operative relation" with the sample cup. As the sample flows through the capillary tube, an electrical potential is applied across the tube and a signal is sent to a detector to facilitate separation of the various components of the fluid sample.

The prosecution history resulting in the issuance of claim 32 will be discussed in the context of claim construction below. Nevertheless, to briefly summarize, claim 32, the only claim at issue on appeal, issued after continuation-in-part (CIP) application[FN1] claims 1, 39, and 40 were combined. Elements [1] through [6] of claim 32 stemmed from CIP application claim 1, element [7] stemmed from CIP application claim 39, and element [8] stemmed from CIP application claim 40.

FN1. That a CIP application and not a straight continuation application was filed is not relevant to the disposition of this case, as the new material added to the specification when the CIP was filed was not directed to the holder limitation at issue.

***2** Princeton sued Beckman for patent infringement, asserting that Beckman's P/ACE electrophoresis devices infringed claim 32 of the '172 patent. The P/ACE devices consist of an apparatus in which a vertically moving table and sample cup is "in operative relation" with a stationary capillary. The parties disputed whether the claim covers only the embodiment where the holder and the capillary tube move vertically toward a stationary sample cup and table, or also the alternative embodiment in which the sample cup and table move vertically toward a stationary holder and capillary tube as in the accused devices.

On cross-motions for summary judgment, the district court held a Markman hearing and construed the claim. The district court interpreted the holder limitation of element [6] as "requir[ing] an apparatus equipped with a holder that lowers the capillary into [the] sample cup before testing and raises the capillary out of the cup after testing." Slip op. at 11. In other words, the district court construed the language "in operative relation" in element [6] to require "vertical movement of the arm which holds the capillary" toward stationary sample cups, Slip op. at 14, rather than vertical movement of the sample cups or the tray holding the sample cups toward a stationary arm holding the capillary.

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The district court based its claim construction on the specification which it found "consistently describes the arm as a vertically moveable component which would lower the capillary so as to permit it to come into contact with the sample cups." Slip op. at 13-14. The district court also relied on the prosecution history. In particular, the district court cited the following as support for its claim construction: (1) the June 2, 1988 office action rejection over Stevenson, U.S. Patent No. 3,918,913, which "contains all of the critical elements recited in the plaintiff's claims: a rotating turntable, a vertically moving sample probe, etc."; (2) the addition of two new claims (29 and 30) in response to that rejection that were limited to a vertically moveable arm and accompanying comments in the remarks section; (3) a response to the advisory action of January 31, 1989 stating "the application has claims which are very detailed as to the apparatus for raising and lowering a capillary into the sample cups"; and (4) the cancellation of application claims 22 to 24 that claimed the alternate embodiment of a stationary capillary and a vertically moving table and sample cups.

Based on this claim construction, the district court granted Beckman's motion for summary judgment of noninfringement. The district court determined that the accused P/ACE devices did not contain the "exact same holder limitation" and in fact "d[id] not contain any such element." Slip op. at 17. The district court further stated that "[t]he capillary in the alleged infringing device is stationary; it does not move vertically. Moreover, the alleged infringing device has no holder for the capillary at all." Slip op. at 18. As a result of these determinations, the district court granted summary judgment of noninfringement.[FN2] Princeton appeals.

FN2. The district court also granted summary judgment of noninfringement under the Doctrine of Equivalents, noting that the accused devices did not contain an equivalent element to the holder described in element [6] of claim 32, in particular an element that would move the capillaries in and out of the sample cups. Slip op. at 20-21. Princeton has not appealed the district court's grant of summary judgment of no equivalent infringement, and this issue may not be raised on remand. *See Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382-83, 49 USPQ2d 1618, 1621 (Fed.Cir.1999).

DISCUSSION

***3** Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (summary judgment is proper when no "reasonable jury could return a verdict for the non-moving party"). In deciding whether a genuine issue of material fact exists, the evidence must be viewed in the light most favorable to the nonmoving party with doubts resolved in its favor. *See O.I. Corp. v. Tekmar Co.*, 115 F.3d 1576, 1580, 42 USPQ2d 1777, 1779 (Fed.Cir.1997). We review a grant of summary judgment *de novo*. *See Conroy v. Reebok Int'l, Ltd.*, 14 F.3d 1570, 1575, 29 USPQ2d 1373, 1377 (Fed.Cir.1994).

Princeton argues that the district court erred in construing element [6], *i.e.*, the "holder limitation," of claim 32. In particular, Princeton asserts that the district court erred by requiring a "vertically moving" holder as no such limitation is present in the asserted claim. Nor, argues Princeton, were any arguments made during the

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prosecution of the application that resulted in the '172 patent and directed at claim 32 that would support reading a vertical movement limitation into that claim We agree

Claim construction is a matter of law, *see* *Markman v Westview Instruments, Inc*, 52 F 3d 967, 979, 34 USPQ2d 1321, 1329 (Fed Cir 1995) (en banc), *aff'd*, 517 U S 370, 372, 116 S Ct 1384, 134 L Ed 2d 577 (1996), that we review *de novo*, *see* *Cybor Corp v FAS Techs, Inc*, 138 F 3d 1448, 1456, 46 USPQ2d 1169, 1174 (Fed Cir 1998) (en banc)

On its face, element [6] of claim 32 would encompass embodiments in which both the holder/capillary and the sample cups/table are vertically movable In order to narrow the claim as the district court did to require only that the holder/capillary be vertically movable, the phrase "in operative relation" must be viewed as sufficiently in need of clarification to resort to the written description as urged by Beckman *See* *Renishaw PLC v Marposs Societa' Per Azioni*, 158 F 3d 1243, 1248, 48 USPQ2d 1117, 1121 (Fed Cir 1998) ("[A] party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, at the very least, point to a term or terms in the claim with which to draw in those statements Without any claim term that is susceptible of clarification by the written description, there is no legitimate way to narrow the property right ") To clarify what "in operative relation" means, we conclude that resort to the written description is permissible in this case

***4** Beckman urges us to adopt the requirement that the district court did, namely, that the holder is limited to vertical movement in relation to stationary sample cups on a stationary table The portions of the written description relied on by Beckman do indeed indicate such vertical movement [FN3] However, Beckman fails to appreciate the import of the clear disclosure in the written description of the alternate embodiment in which the sample cup and table move vertically in relation to a stationary capillary and holder

> FN3 "[A] vertical rod 250 [i e , the holder] which is suitable mounted so that it can be driven vertically up and down "'172 Patent, col 4, ll 42-43, "[T]he capillary can be inserted into a sample cup in table 170 " '172 Patent, col 6, ll 41-42, "[M]otor 260 is energized to lower the arm 240 and the apparatus including tube 248 into the cup containing sample material " '172 Patent, col 8, ll 61-63, "[M]otor 260 is energized to lower the post 240 until the motor is stopped by its sensor 263 at just the point where the tip of the tube 248 is at about the bottom of the cup 190 " '172 Patent, col 9, ll 15-18

As a modification of the invention, the apparatus 10 can be adapted to include means by which rather than raising and lowering the posts 250 and 250' and their associated apparatus, it *raises and lowers either just specific sample cups or the entire tables 170 and 170'* In this embodiment of the invention, the motors 210 and 210' would be constructed to both rotate the posts 200 and 200' and to raise them and lower them vertically as required to raise and lower the tables 170 and 170' '172 Patent, col 9, ll 50-58 (emphasis added) Beckman's attempt to minimize the existence of this disclosure as a "lone sentence" in the written description is meritless

Moreover, in the originally-filed application which eventually resulted in the '172 patent as originally filed, this alternate embodiment was claimed in original application claims 22 to 24

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22. Capillary electrophoresis apparatus comprising

...

first means at said first end of said capillary tube providing a source of a sample substance to be analyzed,

...

said first means including a rotatable table carrying a plurality of sample cups and *a holder for holding an end of said capillary tube in operative relation with one of said cups,* and

means for moving said table and said holder with respect to each other so that said end of said capillary tube can be moved into and out of operative relation with a sample cup.

23. The apparatus defined in claim 22 wherein *said table is movable vertically up and down with respect to said holder* and is rotatable with respect to said holder.

24. The apparatus defined in claim 22 and including a vertical post secured to said table and extending downwardly therefrom, and motor means coupled to said vertical post for rotating said table and for driving said table vertically up and down.[FN4]

FN4. That claims 22 to 24 were eventually canceled during prosecution does not affect our analysis, and the district court erred in attaching significance to that action in support of its claim construction.

(Emphasis added.) The originally-filed claims are deemed part of the original specification. Thus, to the extent that originally-filed claims 22 to 24 and the written description at column 9, lines 50-58 describe an embodiment with a stationary holder and a vertically moving table and sample cups, Beckman errs in relying solely on those portions of the written description describing the vertically moving holder while ignoring those portions describing a vertically moving table. Absent language in the claim specifically limiting the phrase "in operative relation" to vertical holder movement, Beckman cannot find support for the district court's claim interpretation from the specification alone.

***5** Beckman, reiterating the arguments used by the district court in coming to its claim construction, next asserts the prosecution history to support the district court's claim interpretation. Beckman argues that the patentee limited the scope of the claims to vertically moving holders and stationary tables by amending the claims in response to prior art disclosing vertically moving tables and stationary holders, and by arguing in remarks accompanying those amendments that the invention was limited to that embodiment. Princeton responds that the amendments made in response to prior art were directed to claims that did not result in the issuance of claim 32, and that the prior art cited and interpreted by Beckman would not only preclude claiming vertically moving sample cups and tables but also vertically moving holders and capillaries.

A careful review of the prosecution history reveals that

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Princeton is correct Claim 32 resulted from the combination of claims 1, 39 and 40 as filed in a CIP application The original patent application contained 28 claims, to which new claims 29 and 30 were added during prosecution Claim 1 contained the holder limitation found in issued claim 32 Claim 1 was amended in response to prior art to include the vertical movement limitation urged by Beckman, although the holder limitation itself was never amended

Eventually, a CIP application was filed in which claim 1 was returned to its original, *unamended* form Thereafter, claim 1 was rejected as obvious over prior art However, claim 1 was not subsequently amended to include any requirement of vertical movement and in fact was not amended to distinguish over the cited prior art [FN5]

> FN5 Claim 1 was amended to include the limitations of CIP application claim 49 directed to a T-shaped section of capillary tube inserted into the capillary tube to supply a source of cleaning fluid to clean the capillary tube

New claims 31 through 49 were also added when the CIP application was filed Of relevance to issued claim 32, claim 39, which depended on claim 1, was directed to a glass coiled capillary, and claim 40, which depended on claim 39, was directed to that capillary attached to a support member Claim 39 was rejected as obvious over the prior art (the Stevenson patent and an article written by Rose and Jorgenson) Claim 40 was objected to-but not rejected-and was deemed allowable if the limitations of claims 1 and 39 were incorporated The applicant adopted the examiner's suggestion sequentially, first combining claims 1 and 39 and then later, after final rejection, including the limitations of claim 40 The examiner thus allowed the combined claim to issue as claim 32 without any amendment being made or any argument being espoused that would limit the holder limitation to the embodiment where the holder/capillary is vertically moving in relation to a stationary sample cup/table

We hold that the prosecution history does not limit the holder limitation of claim 32 to only vertically movable holders Although the applicant amended claim 1 to include a vertical movement requirement of the holder in the original application, the subsequent filing of the CIP application and the return of claim 1 to its original, unamended form, counsels against applying the usual rule that the entire prosecution history, including parent and grandparent applications, be analyzed in interpreting a claim *See* *Mark I Marketing Corp v Donnelley & Sons Co*, 66 F 3d 285, 291, 36 USPQ2d 1095, 1100 (Fed Cir 1995)

***6** We also hold that the applicant did not limit claim 32 to a vertically moving holder during prosecution as the amendments and arguments cited by the district court were directed to claims other than those that were combined as issued claim 32 *See* *Johnson Worldwide Assocs, Inc v Zebco Corp*, 175 F 3d 985, 992, 50 USPQ2d 1607, 1612 (Fed Cir 1999) ("carefully-crafted arguments" clearly directed to certain claims and not others will "avoid creating ambiguous or adverse prosecution history") Beckman's reliance on certain amendments and remarks made by the applicant during prosecution concerning holder limitations specifically limited to a vertically movable holder is misplaced Those amendments and remarks were directed primarily at application claim 8, a picture claim containing numerous other limitations and directed to the specific embodiment of a vertically moving holder, and not to the broader holder limitation in claim 1 that eventually resulted in issued claim 32

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Beckman's reliance on the prior art, in particular the article by Rose and Jorgenson and the Stevenson patent, also does not lead to the conclusion that the claims must be limited to a vertically moving holder. That prior art discloses embodiments in which capillary tubes, individual sample cups, and rotatable sample tables are raised and lowered. If those combined teachings preclude claiming vertically moveable sample cups and tables as Beckman urges, then those teachings should also preclude claiming a vertically movable holder. Thus, Beckman's interpretation of the prior art would preclude claiming any apparatus having any vertical movement whatsoever.

In summary, neither the written description nor the prosecution history provides any support for Beckman's assertion that the phrase "in operative relation" in the holder limitation must be limited to vertical movement of the holder. Thus, the district court erred in its claim construction. The proper interpretation of the holder limitation is that "in operative relation" encompasses both vertical movement of the holder as well as vertical movement of the sample cups and the table.

Finally, Princeton urges that if we are to reverse the district court's claim interpretation, as we have done, we should also grant summary judgment of literal infringement as the P/ACE devices contain a "holder" in the form of either the cartridge which houses the coiled capillary tube itself or the plugs which seal the capillary tube ends to the cartridge wall at the inlet and outlet openings. Beckman asserts that this is inappropriate as the district court dismissed Princeton's motion for summary judgment of infringement as moot and thus is not before us on appeal. We agree with Beckman. In this case, the proper disposition is for us to remand the case to the district court to determine the issue of literal infringement in light of the correct claim interpretation. Although the district court determined that "the alleged infringing device has no holder for the capillary at all," Slip op. at 18, this finding was based on an incorrect claim interpretation and thus cannot stand.

CONCLUSION

*7 For the foregoing reasons, the district court's grant of summary judgment of noninfringement of claim 32 of Princeton's '172 patent is vacated and the case is remanded for a determination of literal infringement in light of the correct claim construction of the holder limitation.

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